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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

BRIANT BUCKWALTER, JOHN R. REESE and TOWER ENTERPRISES,

Petitioners,

—v.—

COUNTY OF CLARK, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, on relation of LAS VEGAS CONVENTION AND VISITORS AUTHORITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

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8 pp

QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment's Due Process Clause can permit a decision of a State Supreme Court to stand when a justice of that Court had prejudged the sole basis upon which a nine million dollar condemnation judgment was reversed by advising informally members of the legislature that the Supreme Court would "not have a problem" with a statutory amendment designed to "overrule" the court's prior judicial definition of fair market value in eminent domain cases and thereafter authored an opinion holding, as a matter of first impression in the court, that it was not a violation of the separation of powers doctrine for the legislature to re-define the judicial definition of fair market value to the detriment of landowners in state eminent domain actions.

2. Whether the nationwide system of justice governed by the Fourteenth Amendment's Due Process Clause can permit a State Supreme Court to vacate a nine million dollar judgment upon jury verdict in an eminent domain action when two of the four members of the court, particularly the author of the opinion, have manifested, publicly and repeatedly, expressions of extreme bias against counsel who represent the landowners on a contingent fee basis, including untruthful accusations that counsel unlawfully supported their opponents in hotly contested judicial races, had "stalked" the Justice who authored the opinion, and had provided the press with information revealing the author of the opinion to have been under criminal investigation for obstruction of justice following police interceptions of conversations which he held with targets of a drug investigation.

LIST OF PARTIES

The parties before the Nevada Supreme Court, whose judgment is sought to be reviewed, were Briant Buckwalter, John R. Reese, Tower Enterprises, a Nevada partnership comprised of Briant Buckwalter, Ray Buckwalter and John R. Reese, Clark County, Nevada, a political subdivision of the State of Nevada and the Las Vegas Convention and Visitors Authority, a political subdivision of the State of Nevada.

Originally, other parties who held trust deeds on the property were named by the County as defendants in the condemnation case. Those parties were California Federal Savings and Loan Corporation, a California corporation, profit sharing plan of Roy R. Valentine, D.D.S., K.W. Hounsell, K.W. Hounsell, Inc. a profit sharing trust, profit sharing plan of Edgar F. Muncsh, D.D.S., Ralph Engh and Christine Engh. Prior to trial all defendants holding trust deeds in the property were dismissed.

Rule 29.1 Listing

California Federal Savings and Loan Corporation, a defendant dismissed in the trial court and not a party on appeal, became California Federal Bank in 1989 whose parent company was Cal Fed Bancorp, a publicly traded company which sold to First Nationwide Bank in 1997. None of these corporations was a party before the Court whose judgment is sought to be reviewed.

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ON PETITION FOR WRIT OF CERTIORARI TO
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PETITION FOR A WRIT OF CERTIORARI

Petitioners Briant Buckwalter, John Reese and Tower Enterprises respectfully petition for a writ of certiorari to review the judgment of the Nevada Supreme Court in this case.

I. OPINIONS BELOW

The Nevada Supreme Court's order denying the motion to disqualify Justice Young is unpublished. Appendix (App.) 41a. The Nevada Supreme Court's decision denying the motion to disqualify Justice Rose is reported as *Whitacre Inv.*

Co. v. State Dept. of Transportation, 113 Nev. 1101, 946 P.2d 191 (1997). App. 21a. The opinion of the Nevada Supreme Court reversing the judgment upon jury verdict in favor of petitioners is reported as *County of Clark v. Buckwalter,* 115 Nev. ____, 974 P.2d 1162 (1999). App. 1a. The order of the Nevada Supreme Court denying the petition for rehearing is unpublished. App. 15a.

II. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. The Nevada Supreme Court filed its initial opinion on April 9, 1999. App. 1a. The order denying the timely filed petition for rehearing was entered on October 1, 1999. App.15a.

III. CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. am. XIV.

IV. STATEMENT OF THE CASE

The Las Vegas Convention and Visitors Authority, through Clark County, Nevada, filed a complaint in eminent domain to take extremely valuable land owned by petitioners for expansion of the Las Vegas Convention Center. After a trial before a jury, a judgment was entered requiring the County to pay petitioners nine million dollars for the property taken from

them. The judgment was paid to the petitioners and part of the judgment proceeds were received by counsel for the petitioners pursuant to a contingent fee contract.

The County appealed. The primary contention on appeal was a challenge to a determination made by the trial judge, upon separation of powers grounds, to instruct the jury that the fair market value of the property for which petitioners were entitled to compensation was the "highest price" for which the property would sell in an open market transaction. The instruction given by the trial court was taken directly from prior decisions by the Nevada Supreme Court in *City of Elko v. Zillich*, 100 Nev. 366, 370, 683 P.2d 5 (1984) and *Wheeler v. State Dep't of Transportation*, 105 Nev. 217, 218, 773 P.2d 728 (1989) (the definition of 'highest price' "is the standard to be used in Nevada and every appraiser testifying in these cases should use this standard in valuing real property").

After the court decided *Wheeler*, various government agencies supported a bill in the state legislature to modify the definition of fair market value by "reversing" the decision of the Nevada Supreme Court in *Wheeler, supra*. Under the bill, landowners would no longer be entitled to compensation for their property at the judicially defined "highest" fair market value, but would instead be entitled to compensation at the "most probable" market value. The condemnors who testified in favor of the bill believed the legislative modification of the fair market definition would save the government acquisition costs in the condemnation of private property.

In the course of the hearings on the bill, members of the Senate Judiciary Committee expressed concern as to whether it was a proper function of the legislature to "diminish the constitutional meaning of 'just compensation' which had been defined by the Nevada Supreme Court over the years."[1] In

[1] On page 385 of the record on appeal before the Nevada Supreme Court, which contains the minutes of A.B. 80 before the Senate Judiciary Committee on April 23, 1993, the following is found:

(*footnote continued*)

response two members of the committee stated they had conferred with Chief Justice Rose on that point, and Chief Justice Rose had informed them that the Nevada Supreme Court "did not have a problem" with the legislature changing the court's definition of fair market value. Chief Justice Rose "assured" the senators informally that they should "feel free" to change the judicial definition of fair market value if they believed the change would result in "a better definition in the opinion of the legislature." After the assurances of Chief Justice Rose were communicated by the two individual senators to the whole committee, concerns expressed earlier about the separation of powers issue were muted and the bill passed.

Prior to trial, the petitioners filed a motion requesting the trial judge to employ the judicial, rather than the legislative definition of fair market value. The petitioners argued that the determination of compensation in condemnation proceedings is a judicial, not a legislative function. The landowners relied upon *Monogahela Navigation Co. v. United States*, 148 U.S. 312 (1893), in which this Court held that under the Constitution, the determination of the rules and measure by which

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Senator James advised "just compensation" has been defined by the Courts over the years. He was concerned that a change from "highest price" to "most probable price" would diminish the meaning of "just compensation." Senator James quoted from Mr. Gezelin's memoranda,, a passage taken from an 1800s Nevada Supreme Court case: No legislature can diminish by one jot the rotund expression of the constitution of just compensation. Senator Adler stated he had conferred with Chief Justice Rose regarding this question, and that Justice Rose stated the Supreme Court does not have a problem with adding or changing the definition. The Court likes to keep their opinions intact, but the justices stated the legislature should feel free to implement something believed to be better. Senator Adler further advised the court was not adverse to changing or adding to the definition of market value, as long as it was a better definition in the opinion of the legislature. Senator Smith advised that Chief Justice Rose had similarly assured him.

compensation for property taken by government is made does not rest with the public which takes the property through the legislature, but with the judiciary. Clark County's opposition to the landowners' request referred to the assurances provided by Chief Justice Rose to the legislature on this point and requested the trial judge "show deference to the Nevada State Legislature as did Chief Justice Rose." Nonetheless, the trial judge determined the judicial definition of fair market value would apply to the proceedings. Accordingly, appraisers for both sides testified using the "highest price" standard and the jury instruction defined "fair market value" as it had been defined judicially by the Nevada Supreme Court.

The jury returned a verdict of nine million dollars. The landowners were paid by the County, and in turn paid their counsel pursuant to a contingent fee agreement. The County appealed the judgment to the Nevada Supreme Court, providing the court with its first opportunity to decide formally whether the legislative definition of fair market value would supercede the court's own definition. At the initial stages of the appeal, and in compliance with the applicable rule concerning motions to disqualify justices of the supreme court, NRAP 35, the landowners filed separate motions to disqualify Justice Rose[2] and Justice Young. Both motions were predicated expressly upon the guarantee of due process contained in the Fourteenth Amendment to the United States Constitution.

Petitioners sought to disqualify Justice Rose from participating in the appeal because he had prejudged the main issue on appeal by assuring members of the legislature that the court would "not have a problem" if the legislature changed the definition of fair market value and advised the legislature that its members should "feel free" to come up with a definition they felt was "better."

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[2] Court members rotate terms as Chief Justice. Nev. Const. art. VI § 3. Justice Rose served as Chief Justice from January, 1992 to January,1994 and has served as Chief Justice since January of this year.

The disqualification of Justice Rose was also sought because he held a strong personal bias against counsel for the landowners[3]. The record below contains many public expressions which manifest this bias, including accusations made by Justice Rose to the press that counsel for the petitioners was part of an "orchestrated effort" to "soften him up for his re-election" by providing to the press information that Las Vegas police had intercepted conversations between Justice Rose and third parties involved in drug offenses. The following year, Justice Rose told the press he had "a fear of being stalked the rest of his life" by three people, including counsel for the petitioners.

Following his re-election in a very difficult and expensive campaign in which his ownership of a bar and casino became an issue, Justice Rose accused counsel for the petitioners of having disclosed a letter written by the manager his bar soliciting campaign contributions from other bar owners.[4]

Clark County did not file an opposition to petitioners' motion to disqualify Justice Rose. Justice Rose filed a 38 page opposition, including an affidavit in which Justice Rose set forth information he had received from undisclosed sources in support of his public accusations against counsel. The opposition by Justice Rose contained a detailed account of various acts which he believed counsel for petitioners had committed against him politically. Justice Rose complained, in detail, about counsel's support for his opponent in his recent bid for re-election and described counsel's significant

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[3] Counsel of record in this Court represented petitioners at trial and on appeal. Kermitt Waters was co-counsel in the state court proceedings. Both counsel received substantial fees from the judgment which was vacated by Chief Justice Rose under a contingent fee contract with petitioners. This fee arrangement was a matter of record in the state proceedings.

[4] Each of these accusations by Justice Rose against counsel, and many others, are contained in press accounts, press releases and other written statements by Justice Rose which were attached to petitioners' motion to disqualify him.

financial support for the opponent of Justice Young in a later election as being part of a larger effort by political foes of both Justice Young and Justice Rose to unseat them.

Thereafter, Justice Rose filed a supplemental opposition to the motion to disqualify him, in which he referred to himself and counsel for petitioners as the "real parties in interest". In response, counsel lodged with the court a reply which included an affidavit supporting the disqualification of Justice Rose from Richard E. Flamm, an expert on judicial ethics who authored *Judicial Disqualification: Recusal and Disqualification of Judges*, 1996. App. 44a.

By separate motion, the petitioners sought the disqualification of Justice Young from the consideration of their appeal because counsel of record for petitioners in this Court, as well as her co-counsel in petitioners' the state court proceedings, had provided substantial campaign contributions to his opponent in his 1996 re-election campaign. The motion set forth that during an election function, a supporter of Justice Young asked his opponent whether, if he were elected, he would disqualify himself from this case on appeal because of the contributions he received from counsel for these petitioners. Justice Young followed up on the question by commenting that it "appeared" that counsel below had exceeded the legal limit on campaign contributions to his opponent. Clark County did not oppose the motion to disqualify Justice Young, and Justice Young filed no response.

In an unpublished order, three justices, including Justice Rose, denied petitioners' motion to disqualify Justice Young. App. 42a. In a published opinion, authored by Justice Young, with dissents by two justices, the court denied petitioners' motion to disqualify Justice Rose. App. 21a. *Whitacre Inv. Co. v. State Dept. of Transportation*, 113 Nev. 1101, 946 P.2d 191 (1997)[5]. The court thereafter reversed the judgment in

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[5] Petitioners' reply to Justice Rose's supplemental response to the motion to disqualify was lodged with the court, but found by the court to

favor of petitioners in an opinion authored by Justice Rose. App. 1a. *County of Clark v. Buckwalter,* 115 Nev. ___, 974 P.2d 1162 (1999).

V. REASONS WHY THE WRIT SHOULD ISSUE

Petitioners recognize that the facts of this case and the effects of political contributions and other unfortunate components of state judicial elections are unseemly both generally

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be procedurally improper under NRAP 35, and ordered returned unfiled. App. 23a-24a. As was noted in the dissent, petitioners sought to file their reply after the court permitted Justice Rose to file his supplemental response to the motion in which Justice Rose characterized counsel for the petitioners as also being a "real party in interest" in the case. This characterization was indeed accurate, because both petitioners and their counsel had a substantial financial interest in the proceedings. App. 28a.

The dissent to the denial of the motion to disqualify Justice Rose relied in part upon the contents of the reply which was lodged, but ordered returned unfiled. That reply included an affidavit by Richard E. Flamm, an expert on judicial ethics who authored the treatise *Judicial Disqualification: Recusal and Disqualification of Judges*. Mr. Flamm noted that the Court had relied upon parts of his book in denying motion to disqualify Justices Rose and Young in an eminent domain case in which counsel represented former United States Senator Hecht. *City of Las Vegas v. Hecht*, 113 Nev. 632, 940 P.2d 127 (1997); *City of Las Vegas v. Hecht*, 113 Nev. 644, 940 P.2d 134 (1977). Prior to writing his affidavit, Mr. Flamm reviewed the motion, the opposition and supplement filed by Justice Rose, and relevant Nevada cases. Based upon his review of the specific documents filed in this case, Mr. Flamm concluded that Justice Rose's expressed animus towards counsel mandated his disqualification from this case. App. 45a. One basis for this conclusion was the fact that counsel had a substantial pecuniary interest in the outcome of the case sufficient to implicate due process. App. 46a-47a. Another was that the series of statements made by Justice Rose "show quite conclusively that Justice Rose believes Ms. FitzSimmons was part of a conspiracy to destroy his career." App. 50a.

Mr. Flamm noted that in the *Hecht* case, counsel had sought an evidentiary hearing to dispute allegations against her made by Justice Rose. The court summarily denied the request and adopted assertions made by Justice Rose, and contested by counsel, in denying the motion to disqualify. App. 48a-49a.

and particularly to the members of this Court. Yet this is an area in which this Court's intervention is uniquely appropriate and its protections are necessary. In states such as Nevada where all judges, including members of the state's supreme court, must seek and hold office in contested elections, it is not surprising to find a reluctance on the part of the courts to determine that judges are subject to disqualification because of political relationships—either favorable or hostile—with parties and counsel who appear before them. This Court is the forum in which the nationwide guarantee of due process can and should be invoked to remedy the problem and determine the constitutional limitations defining circumstances evident in state judicial politics which would "offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true . . ." *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927).

This Court has stated "our system of justice has always endeavored to prevent even the probability of unfairness". *In Re Murchison*, 349 U.S. 133, 136 (1955). Yet none of its opinions concerning the disqualification of judges under the due process clause has considered the effects of hard fought judicial campaigns, including campaign contributions and support for unsuccessful judicial challengers, on litigant's due process rights to unbiased adjudicators in state courts.[6]

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[6] The importance of this issue is demonstrated by the extent to which commentators have increasingly drawn attention to the due process concerns and apparent impropriety arising from monetary and political support given by lawyers to the campaigns of judges before whom they appear. Ayres and Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 Stan. L. Rev. 653 (1998); Levien and Fatka, *Cleaning up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation*, 2 Mich L. & Pol'y Rev. 81 (1997); Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 Harv. C.R.C.L. L. Rev. 187 (1996); Note, *Attorney Contributions to Judicial Campaigns*, 20 Hofstra L. Rev. 217 (1991); Note, *Judicial Elections Have No Winners*, 20 Stetson L. Rev. 309 (1990); Banner, *Disqualifying Elected Judges from Cases Involving Campaign Contributions*, 40 Stan. L. Rev. 449 (1988); Note,

This Court should grant a writ of certiorari to review the decision of the Nevada Supreme Court on the issue of disqualification because it presents an important question of federal law. This case provides a timely and fitting opportunity for this Court to provide guidance to state courts in their determinations of mounting challenges to the participation of judges in proceedings in which their impartiality is objectively suspect. The decision below was a product of a biased tribunal and due process requires it to be vacated. Sup. Ct. Rule 10(b,c).

A. The Determination Below was Made in Violation of the Rights of the Petitioners to an Impartial Tribunal Because the Justice who Authored the Opinion had Prejudged the Determining Issue and had an Interest in the Outcome of the Case.

This Court has recognized that the most basic protection of due process is an impartial tribunal. *In re Murchison*, 349 U.S. 133, 136 (1955).

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), this Court vacated a civil judgment by the Alabama Supreme Court because the justice who authored the court's opinion should have been disqualified from the case. This Court began by noting most matters relating to judicial disqualification do not rise to a constitutional level and are best left to legislative discretion, and that general allegations of judicial bias and prejudice will often be insufficient to require disqualification on constitutional grounds. Due process becomes implicated, and disqualification is then mandated, only when specific facts indicating bias are presented "which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 822

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(1986), quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

Justice Rose should have been disqualified from this case because he clearly prejudged the dispositive issue before he authored the opinion vacating petitioners' judgment. In its order denying the motion to disqualify, the majority quoted from the minutes of the committee considering the legislative re-definition of 'fair market value' in condemnation cases and then from Justice Rose's rendition of the events. According to Justice Rose, he was called by several state legislators who informed him the legislature would hold hearings to "see if a better definition of 'fair market value' could be achieved." Justice Rose acknowledged informing the legislators that they had the power to redefine the term, and he did not think anyone would be offended. According to Justice Rose he "gave no advice to the legislators and did not defer to them, other than to acknowledge that they had the power to redefine 'fair market value.' " App. 25a.

In denying petitioners' motion to disqualify Justice Rose, the majority held that the conversations between Justice Rose and the legislators did not constitute an advisory opinion (prohibited by the state constitution) and did not indicate the prejudgment of any issue in this case: "Justice Rose simply indicated that the legislature had the power to redefine the definition of 'value' and he did not think the court would be offended." App. 25a. Whether the legislature had the power to act as Justice Rose had opined it could was the primary issue on appeal. Nonetheless, Justice Rose was permitted to participate in the appeal below and author the opinion which reversed petitioners' judgment of nine million dollars. In that opinion, Justice Rose held that:

> The county argues that the district court committed reversible error by giving the jury an erroneous instruction on the definition of fair market value. Specifically, the county contends that jury instruction no 12 was erroneous because the "highest price" standard, which the

> district court adopted from Wheeler v. State, Department of Transp., 105 Nev. 217, 773 P.2d 728 (1989), had been specifically disapproved by the legislature in 1993 when it amended NRS 37.009. We agree. Moreover, to the extent that NRS 37.009(6) contradicts Wheeler, we explicitly overrule Wheeler on this issue.
>
> In 1993, the legislature amended NRS 37.009 mandating that the "most probable price" standard be used to define fair market value in condemnation actions. . . . This amendment was intended to supersede this court's decision in Wheeler and prohibit the use of the "highest price" standard to define fair market value in condemnation actions. See id.
>
> In the case at bar, the district court blatantly ignored this legislative directive be adopting the "highest price" definition in Wheeler because it found that the 1993 amendment to NRS 37.009 was an unconstitutional exercise of the legislature's authority. The district court erred in making this finding.
>
> NRS 37.009 is constitutional. App. 5a-6a.

Thus, the opinion which Justice Rose authored was consistent with his earlier statements to the legislators acknowledging their power to change the judicial standard under which compensation to landowners had been set judicially. Justice Rose's opinion in both instances was not supported in law.[7] In any event, it is clear that prior to rendering his deci-

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[7] The County admitted on appeal that "[i]t does indeed appear to be the law that the determination of the amount of compensation to which the landowner is entitled is exclusively a judicial function". Appellant's Reply Brief, page 7. This admission by the County was in direct conflict with the opinion expressed by Justice Rose to the legislators as well as his opinion in this case, but was necessary under the clear uniform body of law holding the ascertainment of the amount of compensation is a judicial function which cannot be abridged by the legislature. *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299 (1923). The amount of compensation to which a landowner is entitled in a condemnation action had been held by the Nevada Supreme Court, in all prior opinions, to be an

sion in this case Justice Rose was firmly committed to a position on this issue. Having assured members of the legislature that they should "feel free" to redefine "fair market value"

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exclusively judicial function and one which "no legislature can diminish by one jot". *State of Nevada v. Campbell*, 80 Nev. 23,32, 388 P.2d 733, 737-738 (1964); *Virginia & Truckee R.R. Co. v. Henry*, 8 Nev. 165, 171-172 (1873).

In *Milchem Inc. V. District Court*, 84 Nev. 541, 445 P.2d 148 (1968), the court considered state statutes permitting the private condemnation of unimproved land for mining purposes. The statutes provided for the payment to the landowner of the value of the land, exclusive of the value of the minerals. The court determined the act of the state legislature to be unconstitutional. In so doing, the court relied upon *Board of Directors v. Morledge*, 332 S.W. 2d 822, 829 (Ark.1960). There, the court held invalid a legislative act which diminished the compensation to which landowners are entitled in condemnation cases from the compensation previously set by the judiciary.

Another court that cited *Morledge*, supra, was the Supreme Court of Ohio. In *Preston v. Rappold*, 178 N.E. 2d 787 (Oh. 1961), that court considered a statute that required juries in condemnation actions to find and assess separate verdicts upon each claim for compensation and damages. The court declined to invalidate the statute because it was merely procedural in nature. In so doing the court stated:

> It is universally conceded that the amount of compensation to be paid an owner for the land which has been taken from him by exercise of the power of eminent domain is a judicial question and cannot be decided by the legislature.
>
> While the legislature has been held to possess a limited right to provide for certain criteria to be used in the determination of the compensation, it has become settled that the ultimate power to determine such question lies with the judiciary. 178 N.E. 2d 790.

The legislative history of the amendment confirms that the sole purpose of the bill was to decrease the amount of just compensation awarded to landowners in jury trials. In his opinion below, Justice Rose acknowledged that motive and further acknowledged that petitioners and other landowners will receive lesser compensation under the "most probable price" definition. The result is then logically and legally inescapable. The amendment of the definition of "fair market value" by the legislature did not concern procedure or any other matter properly within the legislative realm in condemnation cases. Instead, the sole purpose and effect of the amendment went right to the core of the judicial function in condemnation cases—the determination of the amount of just compensation.

and that the court "does not have a problem" with their doing so, it would have been extremely difficult for Justice Rose to not follow through with his assurances on behalf of the court on this issue and hold as he did below. This Court has held that the consideration of whether due process requires the disqualification of a judge depends upon circumstances and relationships between the judge and the facts of the case. *In Re Murchison*, 349 U.S. 133 (1955). There, this Court held if a judge has a personal interest (including a non-pecuniary interest) in the outcome of a case because he has previously committed himself to a position, due process requires disqualification.[8]

An analysis of the issue must consider each particular situation "under a realistic appraisal of psychological tendencies and human weakness" to determine whether there is "such a risk of actual bias or prejudgment" that the participation of the adjudicator "must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow v. Larkin*, 421 U.S.35, 47 (1975).

B. Two of the Members of the Four Judge Tribunal Below, Particularly the Author of the Opinion, Harbored Extreme and Repeatedly Articulated Prejudice Stemming from an Extrajudicial Political Source Against Counsel for Petitioners Which Denied Petitioners Their Right to an Adjudication Before an Unbiased Court.

The Nevada Supreme Court's denial of petitioners' disqualification motions, as well as all of its recent decisions on disqualification issues, is in direct conflict with the principles which underlie this Court's decisions holding that due process requires an impartial tribunal.

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[8] The salaries and pensions of the Justices of the Supreme Court are determined by the legislature. NRS 2.050, NRS 2.060.

In only one case has the Nevada Supreme Court disqualified a participant in one of its proceedings. In *People for the Ethical Treatment of Animals v. Berosini*, 111 Nev. 431, 894 P.2d 337 (1995), a judgment against an animal rights organization was reversed on appeal. Following that decision the respondent moved for reconsideration alleging that a district court judge who sat on the appeal by designation and participated in the decision should have been disqualified because the judge sat on the advisory board of an animal foundation devoted to pet care and sterilization.

The court granted reconsideration and disqualified the judge from the case. The Court held that the Nevada Code of Judicial Conduct provides substantive grounds for disqualification. Significantly, the court also held that the test as to whether a judge's impartiality might reasonably be questioned is an impartial one, and ignores the judge's own view of his impartiality. In determining whether a judge can objectively be deemed impartial, "this court will exercise its independent judgment of the undisputed facts." *P.E.T.A.*, 111 Nev. at, 894 P.2d at 435-436. Under that standard, the Court held:

> Nonetheless, we conclude that we must grant the motion to disqualify Judge Lehman to avoid even the appearance of impropriety and to promote public confidence in the integrity of the judicial process. We conclude that a reasonable person, knowing all the facts, would harbor reasonable doubts about Judge Lehman's impartiality. . . .
>
> Having concluded we must grant the motion to disqualify Judge Lehman, we further conclude that we must grant rehearing and withdraw our prior opinion in this matter. Although Judge Lehman's vote in this case could be considered mere surplusage because three other justices of this court signed the opinion, we conclude that the role that collegiality plays in appellate decisions mandates full reconsideration of this matter. See Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 829-31, 831-

> 33 (1986) (Brennan, J., concurring, and Blackmun and Marshall, JJ. concurring) Further it would be inconsistent with the goals of the NCJC to require certain standards of behavior from the judiciary in the interest of avoiding the appearance of impropriety but then allow a judge's ruling to stand when those standards have been violated.

P.E.T.A., 111 Nev. at 437, 894 P.2d at 438.

In one isolated instance the court adopted the objective standard of review and disqualified a judge because of his non-judicial membership in a charity which was sympathetic to domestic animals to avoid the appearance of impropriety and to promote public confidence in the judiciary. *P.E.T.A., supra.* Otherwise the court has consistently failed to protect the rights of litigants—both civil and criminal—to an impartial tribunal. The court has refused in all instances to disqualify judges either because they are politically beholden to a party or lawyer or because they believe a party or lawyer to be antagonistic to their political careers.[9]

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[9] In each case in which litigants before the Nevada Supreme Court have claimed bias from judicial election activity, the court has refused disqualification. *Nevius v. Warden*, 114 Nev. 664, 960 P.2d 805 (1998) cert denied 119 S.Ct. 878, 142 L.Ed 778 (1999); *State Dept of Transp. v. Barsy*, 113 Nev. 709, 941 P.2d 969 (1997); *City of Las Vegas v. Hecht*, 113 Nev. 632, 940 P.2d 127 (1997); *City of Las Vegas v. Hecht*, 113 Nev. 644, 940 P.2d 134 (1997); *Hogan v. Warden*, 112 Nev. 553, 916 P.2d 805 (1996) cert denied 519 U.S. 944 (1996) (O'Connor and Ginsburg JJ., dissenting); *Martin v. Beck*, 112 Nev. 595, 915 P.2d 898 (1996); *Snyder v. Viani*, 112 Nev. 568, 916 P.2d 170 (1996) cert denied 519 U.S. 963 (1996); *Valladares v. Second Judicial Dist. Ct.*, 112 Nev. 79, 910 P.2d 256 (1996); *Ainsworth v. Combined Ins. Co. of America*, 105 Nev. 237, 774 P.2d 1003 (1989) cert denied 493 U.S. 958 (1989); *Matter of Dunleavy*, 104 Nev. 784, 769 P.2d 1271 (1988). The lengths to which the Nevada Supreme Court has gone in denying disqualification of its members were described by a Nevada federal bankruptcy judge in an article in the state's bar journal. Goldwater, *Disqualification of Justices of the Supreme Court of Nevada*, 6 Apr. Nevada Lawyer 26 (1998).

In denying petitioners motion to disqualify Justice Rose, the majority ignored its holding in *P.E.T.A., supra.* Rather than employing an objective standard on undisputed facts, the court adopted Justice Rose's allegations and rejected those of counsel.[10] The court did so by simply adopting its holding in its prior decision in *City of Las Vegas v. Hecht*, 113 Nev 644, 940 P.2d 134 (1997), in which the court's statement of facts adopted many of Justice Rose's allegations against counsel which she had denied and upon which she had unsuccessfully sought an evidentiary hearing. App. 22a. In petitioners' motion to disqualify Justice Rose, counsel again unsuccessfully asserted a due process entitlement to a hearing before unchallenged justices, as provided by state statute. NRS 1.225(4).

It is clear in this case that Justice Rose believed counsel for the petitioners to be a political threat, both to himself and to Justice Young. The record reveals the challenged justices' preoccupation concerning the funding of both their own and their opponent's judicial campaigns. Repeated references to counsel's campaign contributions to Justice Young's opponent have been made by Justice Rose in reported cases in which counsel was not a party. *Nevius v. Warden*, 114 Nev. 664, 960 P.2d 805 (1998), cert. denied 119 S. Ct. 878, 142 L.Ed 2d 778 (1999); *Del Papa v. Board of Regents*, 114 Nev. 388, 956 P.2d 770 (1998).

Justices Rose and Young focused upon counsel's donations to Justice Young's opponent in their dissent in *O'Brien v. State Bar of Nevada*, 114 Nev. 71, 952 P.2d 952 (1998). There, an unsuccessful applicant for a State Bar appointment to the Nevada Judicial Selection Commission petitioned the court to vacate the appointment of counsel of record for the petitioners here to the Commission. One of the members of the Board of Governors of the State Bar was Justice Young's

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[10] It was clear to Justice Maupin, who dissented from the denial of petitioners' motion to disqualify Justice Rose, "from [his] own review of the record" that Justice Rose should be disqualified. App. 39a-40a.

opponent to whom counsel had given the campaign contributions which were the subject of the petitioners' motion to disqualify Justice Young from this case. The majority held that the campaign contribution did not preclude the donee from participating in a *non-judicial* appointment of counsel. In their dissent, Justices Young and Rose stated that the donee board member had received contributions from counsel for the petitioners which were so large that they created an appearance of impropriety. They concluded that Justice Young's former opponent should have been disqualified from voting on counsel's appointment. The justices noted that raising money for judicial campaigns is an integral part of the election process and judicial candidates "are thankful for all contributions made by lawyers, large or small. However, there does come a point when the amount of money contributed creates an appearance of impropriety, especially when the judge is ruling or voting on an issue critical to the lawyer contributor." *O'Brien v. State Bar*, 114 Nev 71, 79, 952 P.2d 952, 957-958 (1998).

Both Justices Rose and Young recognized that substantial contributions to judicial campaigns can warrant disqualification when the beneficiary of the contributions was an opponent of Justice Young's and when the result would be disadvantageous to counsel of record in this case. Yet in petitioners case there was no acknowledgment by the majority that substantial contributions to a judge's opponent give rise to a due process violation when the judge determines a case in which the contributor to the opponent has a substantial financial interest. The temptation for a judge to punish a perceived political adversary is equally as probable as is the temptation to reward a political supporter. [11] Both give rise to

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[11] *See; Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (probability of actual bias too high to be constitutionally permissible if adjudicator has been target of personal criticism by party). In the context of contempt proceedings, this Court has placed due process limitations upon a judge's power to punish contemptuous behavior to which the adjudicator has been subjected. *Taylor v. Hayes*, 418 U.S. 488 (1974); *Mayberry v. Penn-*

legitimate concerns of bias and prejudice which are objectively predictable and both stem from an extra-judicial source. *Liteky v. United States*, 510 U.S. 540 (1994) (in a statutory disqualification case, most common basis for disqualification for favorable or unfavorable predisposition will be found if source of opinion is extrajudicial source).

The common issue in both disqualification motions filed by petitioners was that their counsel had provided substantial assistance to each justice's political adversaries. Petitioners' motion to disqualify Justice Rose contained additional facts establishing extreme animus of extrajudicial origin. In his opposition to the disqualification motion, Justice Rose repeated allegations, including allegations from unrevealed sources, against counsel which were untrue, and were adopted by the court without a hearing. Having previously recognized "the role that collegiality plays in appellate decisions" *P.E.T.A.*, 111 Nev. at 437, 894 P.2d at 438, the majority aligned itself with Justice Rose and against petitioners, both in denying their motion to disqualify him and in joining in his opinion vacating the substantial judgment they had obtained from a jury. A consideration of the facts and circumstances

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sylvania, 400 U.S. 455 (1971); *Ungar v. Sarafite*, 376 U.S. 575 (1964). To the extent that the contempt cases may be relevant to the issue here, it should be noted Justice Rose's accusations against counsel to the press and in his opposition to the motion to disqualify him in this case were in large part directly refuted by counsel for the petitioners in her sworn affidavit. Rather than holding an evidentiary hearing to resolve the conflicts between Justice Rose's claims and those of counsel, the majority adopted the assertions of Justice Rose. All events claimed by Justice Rose which evidenced his belief he had been personally abused and criticized by counsel were in a political, not a judicial, forum. This distinction was acknowledged by Justice Rose in his affidavit below in which he stated "I have always considered Laura FitzSimmons an excellent attorney and advocate before the Nevada Supreme Court. Despite the fact that she has actively sought to find and support people to defeat me and has engaged in other personal attacks on me, I have never let her actions bias or prejudice my adjudication of the merits of any case in which she has participated."

present here, and the direct, personal involvement of Justice Rose in the events below, mandates a conclusion that petitioners' rights to due process were violated. *In Re Murchison*, supra.

VI. CONCLUSION

While this case may present a situation in which judicial animus against perceived political enemies is extreme, the effect of state judicial politics upon the due process rights of parties who appear before judges is a growing problem the nature of which inhibits the ability of state courts to respond in a manner which "must satisfy the appearance of justice". *Offut v. United States*, 328 U.S. 11, 14 (1954). This Court should grant the petition and take this opportunity to define the constitutional standards applicable nationwide under which litigants will be more likely to obtain fair decisions from unbiased courts.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF NEVADA

No. 29477
April 9, 1999
Rehearing Denied Oct. 1, 1999

COUNTY OF CLARK, A Political Subdivision of the State of Nevada, On Relation of Las Vegas Convention and Visitors Authority,

Appellant,

—v.—

Briant BUCKWALTER; John R. Reese; California Federal Savings and Loan Association A California Corporation; Tower Enterprises, A Partnership; Profit Sharing Plan of Roy R. Valentine, D.D.S., A Professional Corporation; K.W. Hounsell; K.W. Hounsell, Inc., A Profit Sharing Trust; Profit Sharing Plan of Edgar F. Muncsh, D.D.S., A Professional Corporation; Ralph W. Engh and Christine J. Engh, Husband and Wife,

Respondents.

In a condemnation action, the District Court, Clark County, Don P. Chairez, J., entered judgment on jury's award of $9,000,000 to landowners. County appealed. The Supreme Court, Rose, C.J., held that the trial court's error was not harmless in instructing jury to apply "highest price" standard

rather than "most probable price" standard when determining fair market value of condemned property.

Reversed and remanded for new trial.

Maupin, J., concurred in the result and filed an opinion.

DICKERSON, DICKERSON, CONSUL & POCKER and LUKE PUSCHNIG, Las Vegas; Stewart L. Bell, District Attorney, and Dale E. Haley, Deputy District Attorney, Clark County, *for appellant*.

LAW OFFICES OF KERMIT L. WATERS, AND LAURA WIGHTMAN FITZSIMMONS, Las Vegas, *for respondents*.

OPINION

ROSE, C.J.

Appellant Clark County (the "county"), acting on behalf of the Las Vegas Convention Authority, filed a condemnation action seeking two parcels of property located across from the Las Vegas Convention Center (the "property"). The property was owned by Briant Buckwalter, John R. Reese, and several others (the "landowners").

Prior to trial, the landowners filed a motion to define fair market value as the "highest price" the property would bring on the open market. The district court granted this motion, instructing the jury to award the "highest price," despite the fact that the legislature in amending NRS 37.009 had defined fair market value as the "most probable" price.

After an eight-day trial, a jury found that just compensation for the property was $9,000,000.00. The county appeals, in

part, because it alleges that the district court committed reversible error by giving the jury the "highest price" instruction. We agree, and for the reasons set forth below, we reverse the district court's judgment and order and remand for a new trial.

FACTS

In the early 1980's, the landowners formed a partnership and purchased the property, which consisted of two parcels near the Las Vegas Convention Center. Although the property housed apartment buildings, it was zoned for commercial use, to include retail, food and beverage, or gaming facilities.

In September 1993, the county adopted a resolution of "need and necessity" announcing its intention to condemn the property for expansion of the Las Vegas Convention Center. After a period of unsuccessful negotiations concerning the fair market value of the property, in April 1994, the county filed a condemnation action against the landowners in Clark County district court. Approximately one month later, the county gained the right of immediate occupancy of the property. After rejecting the landowners' offer of judgment of $4,850,000.00, the parties prepared for trial.

Prior to trial, the district court held several hearings on the parties' motions in limine, including the landowners' motion to define fair market value. In this motion, the landowners argued that the fair market value of the property should be defined as the "highest price" the property would bring on the open market. The landowners further argued that the legislature's enactment of NRS 37.009, defining fair market value as the "most probable price," was unconstitutional as a violation of the separation of powers because the legislature had no authority to deflate just compensation. In contrast, the county argued that fair market value should be defined as the "most probable price" the property would bring on an open market pursuant to NRS 37.009. The district court granted the

landowners' motion, adopting the "highest price" definition of fair market value.

On April 8, 1996, the matter proceeded to trial. Each party presented experts who testified on the market value of the property. The landowners' experts testified that the "highest price" of the property was between $9,017,000.00 and $9,769,000.00, while the county's expert testified that the "most probable price" of the property was $4,560,000.000.

After an eight-day trial, the jury determined by special verdict that the just compensation for the property was $9,000,000.00 as of April 26, 1994, and $9,769,00.00 as of April 8, 1996. The district court then concluded that April 26, 1994, was the appropriate valuation date and awarded the landowners $9,000,000.00.

On May 13, 1996, the county filed a motion for a new trial. In a post-trial hearing following the denial of the county's motion for a new trial, the district court stated that the "highest price" definition of fair market value was "the one legal issue that we [the county] really ha[d] in arguing before . . . the Nevada Supreme Court." Thereafter, the county filed this timely appeal.

DISCUSSION

The county argues that the district court committed reversible error by giving the jury an erroneous instruction on the definition of fair market value.[1] Specifically, the county

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[1] The county further argues that reversal is warranted because the district court erroneously: (1) required testimony on two different valuation dates; (2) admitted into evidence the landowners' "highest and best use" of the property;(3) permitted the landowners to reopen their case-in-chief; (4) excluded evidence regarding the landowners' opinions of the property's value; (5) excluded evidence regarding the 1984 and 1988 purchase prices of the property; and (6) refused to allow the county to present rebuttal evidence. Having reviewed the record and having had the benefit of oral argument of counsel, we conclude that the county's arguments lack merit because although errors were committed by the district court, these errors were harmless as they did not affect the substantial rights of the parties. See NRCP 61.

contends that jury instruction no. 12[2] was erroneous because the "highest price" standard, which the district court adopted from Wheeler v. State, Department of Transp., 105 Nev. 217, 773 P.2d 728 (1989), had been specifically disapproved by the legislature in 1993 when it amended NRS 37.009. We agree. Moreover, to the extent that NRS 37.009(6) contradicts Wheeler, we explicitly overrule Wheeler on this issue.

In 1993, the legislature amended NRS 37.009[3] mandating that the "most probable price" standard[4] be used to define fair market value in condemnation actions. See NRS 37.009(6); Hearing on A.B. 80 Before the Assembly Comm. on Judiciary, 67th Leg. (Nev., Mar. 29, 1993). This amendment was intended to supersede this court's decision in Wheeler and prohibit the use of the "highest price" standard to define fair market value in condemnation actions. See id.

In the case at bar, the district court blatantly ignored this legislative directive by adopting the "highest price" definition

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[2] The district court gave the following jury instruction defining market value:

> The fair market value of property is the highest price on the date of valuation that would be agreed to by a seller who is willing to sell, but who is under no particular or urgent necessity for so doing, and who is not obligated to sell, and a buyer who is ready, willing, and able to buy, but who is under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.

(emphasis added).

[3] NRS 37.009(6) provides, in relevant part, that:

> "Value" means the most probable price which a property would bring in a competitive and open market under the conditions of a fair sale, without the price being affected by undue stimulus, whereby the sale is consummated on a specified date and the title to the property is passed from the seller to the buyer. . . .

(emphasis added).

[4] The "most probable price" standard was adopted from the federal definition of fair market value in condemnation actions. See 12 C.F.R. § 34.42 (1998).

in Wheeler because it found that the 1993 amendment to NRS 37.009 was an unconstitutional exercise of the legislature's authority. The district court erred in making this finding.

NRS 37.009 is constitutional.

This court has held that the right to just compensation for private property is a right guaranteed by the United States and Nevada Constitutions that cannot be impaired by statute. Alper v. Clark County, 93 Nev. 569, 571 P.2d 810 (1977). Moreover, this court has held that the determination of just compensation is exclusively a judicial function. Clark County v. Alper, 100 Nev. 382, 394, 685 P.2d 943, 951 (1984). These holdings, however, do not support the proposition that the legislature lacks authority to make laws in the area of eminent domain. Indeed, the legislature, as the law- making body of the state of Nevada, has such authority provided it acts within constitutional limits. See Galloway v. Truesdell, 83 Nev. 13, 422 P.2d 237 (1967). We see nothing unconstitutional in requiring that landowners receive the "most probable price" as just compensation for their land. Accordingly, we conclude that NRS 37.009 is a constitutional exercise of the legislature's authority, and that the district court erred in concluding otherwise.

The district court's error was not harmless.

The landowners argue the district court's erroneous instruction was harmless error because the "highest price" as set forth in Wheeler and the "most probable" price pursuant to NRS 37.009 are synonymous. We disagree. We conclude that these two terms have different meanings, and that the district court committed reversible error by giving the "highest price" instruction because it likely affected the jury's verdict. See Horvath v. Burt, 98 Nev. 186, 643 P.2d 1229 (1982) (reversal is warranted where a different result might have been obtained in the absence of the erroneous instruction).

First, there is a clear distinction in the plain meaning of the terms "most probable" and "highest" price. "Probable" price is defined as the price "likely to occur or be; that can reasonably but not certainly be expected." Webster's New World

Dictionary 1072 (3d ed.1988). The "highest" price is defined as "greater in size, amount, degree, power or intensity etc. than usual." Id. at 636. These definitions are far from synonymous. A hypothetical exemplifies this difference: one person appraises a piece of land at $1000.00, while five others value the land at $800.00. Based on these appraisals, the highest price of the land is not the same as the most probable price because the highest appraisal is $200.00 more than the "most probable" or likely appraisal value of $800.00. Thus, the plain meaning of "most probable" and "highest" supports the proposition that these terms are different.

Second, even if this difference were somehow ambiguous, this court has held that it will presume a substantial change in the law when a statute is amended to change a definition previously used. See Clark County v. State, Equal Rights Comm'n, 107 Nev. 489, 491, 813 P.2d 1006, 1007 (1991). With regard to NRS 37.009, the legislature amended this statute to change the definition of fair market value from "highest price" to the "most probable price." Because a statute was amended to change a definition previously used, this court will presume a substantial change. Accordingly, the "most probable" price is a substantial change from the "highest price," and thus the terms are not synonymous.

Third, in the case at bar, there was a manifest practical difference between the "most probable" price and "highest price" because the incorporation of the "highest price" standard resulted in a vast $5,000,000.00 disparity in the value of the property. The landowners' experts testified that the "highest price" of the land was between $9,017,000.00 and $9,769,000.00, based in part on their evaluation of the "highest and best use" of the land as a hotel casino. In contrast, the county's expert testified that the "most probable price" of the land was $4,560,000.00, based in part on his evaluation of the land's "most probable" use as a retail/restaurant facility. Moreover, the county's expert testified that it was not probable that a casino would be built on the land based on the small size of the parcel and an economic feasibility analysis

that suggested the parcel was ill-suited for a casino. Using the "highest price" instruction probably cost the taxpayers more than $5,000,000.00 in this case because the landowners' valuation was based on a casino being built on the property, a scenario that was not probable. Thus, because of the $5,000,000.00 disparity in valuation of the property resulting, in part, from the use of the "highest price" instead of the "most probable price" standard, we conclude that the terms are not synonymous.

Fourth, the district court itself noted a manifest practical difference between the "highest price" and "most probable price" when it stated on the record that the "highest price" jury instruction affected the jury's verdict. Moreover, the district court noted its own error when it stated on the record that the county had a valid issue to argue before this court, and if the district court had this case to try again, it would have allowed the "most probable price" instruction in a split verdict format. Thus, even the district court recognized a distinction between the two instructions and the fact that the terms were not synonymous.

Finally, the legislative history of NRS 37.009 supports our conclusion that the "highest price" and the "most probable price" are not synonymous. The legislature's rationale for eradicating the use of the "highest price" standard was to prevent misuse and abuse that occurred when:

> attorneys for condemnees, and their specially selected expert witnesses, . . . used the phrase 'highest price' to encourage jurors to speculate in terms of the highest price conceivable, however improbable. The resultant findings of value [by speculating juries were] out of touch with the existing market and reality.

Hearing on A.B. 80 Before the Assembly Comm. on Judiciary, 67th Leg. at Ex. E (Nev., Jan. 29, 1993) (emphasis added).

In the case at bar, the landowners misused and abused the "highest price" instruction in their closing argument to

justify the five million-dollar difference in value when they argued:

> Ladies and gentlemen, what I'd like to talk to you about, if I could for a second, is when you look at Mr. Morse's appraisal [Clark County's expert] you are going to find, among other things, that he didn't use this highest price definition as the court has told you. And I told you in the opening statement that it would be the highest price. He used the most probable price.
>
> Now, ladies and gentlemen, you don't need to be a rocket scientist to know that those two words have a different meaning, most probable and highest. And he says, "Oh, they're the same thing to me." Do you believe that? I don't believe that.
>
> It's more probable that somebody would have $100 to pay for a piece of property than it would be for somebody for [sic] have $1,000.00. There would be more people that could do that. And so that's their way [Appellant Clark County] of coming down to this $5 million. That's one of their ways of doing it by using the term "most probable."

(emphasis added). In other words, the landowners used the distinction in meaning between the "highest price" and the "most probable price" standard to justify the $5,000,000.00 difference in the appraisals of the land and advocate for the higher price.[5] Ironically, the landowners' closing argument exemplifies the exact type of misuse and abuse of the Wheeler instruction that the legislature was trying to eradicate by changing the law.

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[5] We note that at the district court level the landowners argued that the two standards, "highest price" and "most probable price," were very different. On appeal, however, the landowners argue that the two standards are synonymous. This court, however, has often said that a party cannot change positions from that asserted before the district court. See Powers v. Powers, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989) Tupper v. Kroc, 88 Nev. 146, 151, 494 P.2d 1275, 1278 (1972).

In sum, we conclude that the county was entitled to have the jury properly instructed on NRS 37.009—that the fair market value of the property was the "most probable price." See Beattie v. Thomas, 99 Nev. 579, 583, 668 P.2d 268, 271 (1983) (a party is entitled to have the jury instructed on the law applicable to each claim). Therefore, the district court erred in giving the "highest price" instruction to the jury because this instruction was contrary to NRS 37.009. The district court's error warrants reversal because the erroneous instruction likely yielded a different, inflated verdict that would likely not have been awarded had the most probable price instruction been used.

Accordingly, we reverse the district court's judgment and order and remand this case for a new trial where the "most probable price" instruction is given, as required by law.[6]

YOUNG and SHEARING, JJ., concur.

MAUPIN, J., concurring.

I concur in the majority's result, albeit for alternate reasons.

Respondent's contention that NRS 37.009 is unconstitutional lacks merit. The state legislature is within its authority to enact legislation and to amend or repeal its statutory law unless the legislative action is specifically precluded by constitutional limitations. Moreover, "statutes are to be construed in favor of the legislative power." Galloway v. Truesdell, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967) (citing In the Matter of Platz, 60 Nev. 296, 108 P.2d 858 (1940)). As the Nevada Constitution does not preclude this legislation, the presumption of legislative authority prevails. Here, the legislation simply provides a reasonable definition of the scope of recovery in

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[6] This matter was submitted for decision prior to expansion of the court from five to seven justices on January 4, 1999; only those justices remaining on the court who previously heard this matter participated in the decision.

condemnation actions. Although it may be argued that the legislature's statement of public policy on these issues should be revisited, that policy is rationally based for the purposes of constitutional analysis. Any contention with this legislative policy should be addressed to the legislature.

Thus, I agree with the majority that the trial court was wrong in its conclusion that NRS 37.009 is unconstitutional. I depart from the majority in its conclusion that NRS 37.009 effects a legislative repealer of Wheeler v. State, Department of Transportation, 105 Nev. 217, 773 P.2d 728 (1989). Although the enactment of NRS 37.009 was intended to do just that, the language chosen by the legislature does not effect this purpose. The statute mimics the Wheeler holding, only changing the term "highest price" to "most probable price." Contrary to the majority, I conclude that the terms are synonymous.[1] Thus, the jury should have been given two

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[1] Appellant's own expert witness/appraiser testified that the value of the property would be the same under either the "most probable price" standard or the "highest price" standard. During trial, the following exchange occurred between the County's lawyer, Dale Haley ("Haley"), and the County's appraiser, Tim Morse ("Morse"):

> HALEY: Could you also give your definition of fair market value . . .?
>
> MORSE: Yes. Market value definition. . . . That is—it's the most probable price which a property would bring in an open and competitive market under all conditions to a fair sale without the price being affected by undue stimulus whereby the sale is consummated on a specific date and the title to the property is passed from the seller to buyer under the following conditions: That the buyer and seller are acting prudently and knowledgeably, that the buyer and seller are typically motivated, that the buyer and seller are well informed.
>
> Also, that there's a reasonable period of time to allow the property for exposure to the open market, and that payment is made in U.S. Dollars in cash. Or other precisely related terms similar to cash, and that the sale price represented the normal consideration for the property and there are no special or creative type financing or other concessions that would be granted in the price.

(*footnote continued*)

instructions on fair market value, one containing the statutory language, and a second defining most probable price as the "highest price" on the date of valuation that would be agreed to by a willing seller and a motivated buyer under normal market conditions. Here, the instruction given by the trial court would have, in my view, been appropriate if accompanied by the statutory language.

I take this position because the industry, that is persons in the business of appraising real estate, do not seem to regard the terms "highest price" and "most probable price" as comprising anything other than a distinction without a difference. See note 1. This was certainly the case with regard to the appraiser's testimony in Wheeler, and with regard to the county's appraiser below.

The problem at trial was created by the failure to instruct on the statute and, later, the forensic approach taken during closing argument with regard to the instruction's definition of fair market value by counsel for the landowners. Counsel did argue that it would not take a "rocket scientist" to tell the manifest difference between the terms used in the statute and the terms used in the instruction. Given the trial court's incomplete definition of fair market value, counsel's rhetoric comparing that definition with the testimony of the county's expert was not improper. Had the jury been properly instructed, the argument would have been in conflict with the legal doctrine presented to the jury.

HALEY: Have you ever heard the term highest price used in relation to fair market value definition? Have you ever heard of that being used?

MORSE: Yes.

HALEY: Does it make any difference whether you use most probable price or highest price in your analysis?

MORSE: No. It makes no differences in my opinion.

HALEY: Does the most probable price result in the highest price?

MORSE: Yes, it does.

HALEY: That's how the market operates; is that correct?

MORSE: Yes, it does.

Here, the landowners successfully fought for an instruction defining fair market value that did not include the statutory language and then attempted to draw a distinction between "highest price" and "most probable price." This strategy, which is at odds with the views stated in this separate opinion, was made more feasible because the county's appraiser used the statutory language in forming his opinion, although being of the further opinion that the two terms were synonymous.

The trial court's adoption of the landowners' position with regard to fair market value enabled the landowners to employ the above strategy. However, the "rocket scientist" argument improperly expanded upon the "highest price" instruction that was given. Had the landowners' closing argument been premised on the assumption that the terms "highest" and "most probable" were synonymous, the failure to instruct on the statute would arguably have been harmless error. Thus, it was the instruction and the arguments made in connection with the instruction that form the need for a second trial below.

While counsel's final argument demonstrates an attempt to draw a distinction between the "highest price" and "most probable price" in this context, the appraisal industry does not draw such a distinction. If juries are instructed as I suggest, and if jury arguments are kept consistent with the instructions, just compensation to all parties will be realized. For example, on re-trial, the county will certainly be free to argue that the most probable price for the subject property based upon its highest and best use should not include speculative casino development.[2]

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[2] The majority hypothesizes that, under the instruction given by the trial court, a single appraisal of $1000 would have to be accepted on valuation against five appraisals of $800 based upon the "most probable price." While such is not the inevitable result of the instruction, protection against this interpretation would be in place if condemnation juries are instructed as I suggest.

The trial court's ruling on this issue, which facilitated the tactical approach of counsel during closing argument, compels reversal. See Horvath v. Burt, 98 Nev. 186, 643 P.2d 1229 (1982) (reversal is warranted where different result might have been obtained in the absence of the erroneous instruction).[3]

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[3] With regard to the other assignment of errors mentioned in note 1 of the majority opinion, I do have some individual comments. First, under no circumstances should the jury have been required to find two sets of damage figures based upon two different valuation dates. This case went to trial within the two-year period provided under NRS 37.120. While the trial court clearly erred in this regard, this error was harmless. Second, while exclusion of the evidence of the original purchase price paid by the landowners may have been within the court's discretion, this was certainly a close call under these circumstances. Its probative value as to a current valuation would easily have been dealt with on cross-examination of the experts. Third, the exclusion of the landowners' views on valuation stated in correspondence between counsel was certainly proper because the letters were part and parcel of settlement negotiations.

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 29477
Filed October 1, 1999

COUNTY OF CLARK, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, ON RELATION OF LAS VEGAS CONVENTION AND VISITORS AUTHORITY,

Appellant,

—vs.—

BRIANT BUCKWALTER; JOHN R. REESE; CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, A CALIFORNIA CORPORATION; TOWER ENTERPRISES, A PARTNERSHIP; PROFIT SHARING PLAN OF ROY R. VALENTINE, D.D.S., A PROFESSIONAL CORPORATION; K.W. HOUNSELL; K.W. HOUNSELL, INC., A PROFIT SHARING TRUST; PROFIT SHARING PLAN OF EDGAR F. MUNCSH, D.D.S., A PROFESSIONAL CORPORATION; RALPH W. ENGH AND CHRISTINE J. ENGH, HUSBAND AND WIFE,

Respondents.

ORDER DENYING PETITION FOR REHEARING

We reject respondents' contention that the Court enacted a standard of compensation based upon "most probable" use. It is perfectly permissible for any party to a condemnation action to argue probability of use of the parcel being taken through eminent domain. The jury was properly instructed in

that regard below and that the "highest and best" use must be reasonable, probable, legal and financially feasible. However, valuations must reflect "the most probable price" based upon factors affecting market value including the taken parcel's "highest and best" use. Issues concerning highest and best use and the most probable price are fact based and, thus, are to be left for determination by a jury or a court sitting without a jury.

In our opinion in this case, we did not intend to imply that the landowner's evidence at trial was insufficient as a matter of law to support a valuation based upon casino development. The use to which the real property can be put is relevant if it addresses the factors set forth in the definition of "highest and best use." These evidentiary determinations should be made by the district court,

The Petition is DENIED.

ROSE _____, C.J.
Rose

MAUPIN _____, J.
Maupin

SHEARING _____, J.
Shearing

cc: Hon. Mark R. Denton, District Judge
Clark County District Attorney
Dickerson, Dickerson, Consul & Pocker
Law Office of Kermitt L. Waters
Clark County Clerk

YOUNG, J., concurring:

I agree that a rehearing of the appeal is not warranted. I write separately, however, to comment upon petitioners' flagrant disregard of NRAP 40.

NRAP 40(c)(1) provides that "[m]atters presented in the briefs and oral arguments may not be reargued in the petition for rehearing . . . ." Despite this explicit mandate, petitioners raise numerous contentions in the petition for rehearing that have already been briefed, orally argued, and carefully considered by this court.

Specifically, petitioners reargue the issues of whether the legislature had authority to amend NRS 37.009 and whether Chief Justice Rose should have been disqualified because he had allegedly prejudged the key issue in this case. In requesting that this court revisit issues already decided, petitioners cause the expenditure of valuable and limited judicial resources without justification. This waste of the taxpayers' dollars is unacceptable. I refuse to sit idly by without comment while petitioners violate NRAP 40 in such blatant disregard of this court's underlying policy of judicial economy.

NRAP 40(c)(1) further provides that rehearing is warranted when this court has misapprehended a material issue of law or fact. Petitioners ignore the materiality requirement set forth in this subsection. The petition for rehearing is riddled with bare-boned assertions that this court misapprehended law and fact, without reference to how these misapprehensions are material. With reckless accusations and an irresponsible bandying about of disparaging terms, petitioners' arguments lack the substance necessary to establish their case.

This fact is revealed through several examples. First, petitioners allege that one of their expert's valuation of the land was $8,265,895.00, rather than $9,000,000.00. Second, petitioners imply that 12 C.F.R. § 34.42 is not used in federal condemnation actions. Third, petitioners assert that this court's citation to Galloway v. Truesdell, 83 Nev. 13, 422 P.2d 237 (1967), was "far too cavalier."

In alleging these misapprehensions of fact and law without reference to their materiality, petitioners again disregard NRAP 40(c). Moreover, these allegations of misapprehension of facts and law are unfounded, as our review of the record revealed expert testimony that the land's value was over $9,000,000.00, based in part on its use as a casino.

Likewise, petitioners' intimation that 12 C.F.R. § 34.42 is a federal lending statute not used in condemnation cases is false. In point of fact, the majority of federal courts use the "most probable" price standard in condemnation actions, as set forth in 12 C.F.R. § 34.42. *See* Hearing on A.B. 80 Before the Assembly Comm. on Judiciary, 67th Leg. (Nev., Mar. 29, 1993). Counsel for petitioners should be aware of this practice, as she works extensively in the area of condemnation law.

Finally, our use of *Galloway* was not cavalier. it has not been overruled and stands for the proposition for which it was cited; to wit, that the legislature can make laws provided they are constitutional.

Furthermore, it is improper to misrepresent relevant facts or law to this court in a petition for rehearing, or any court document for that matter, even if the misrepresentation is inadvertent. I believe petitioners have made misrepresentations by distorting the record. The petition is replete with such distortions. For example, petitioners deem Chief Justice Rose a "consultant to the legislature" and accuses him of "prejudg[ing] the main issue" when, in fact, this court has already concluded to the contrary—that Chief Justice Rose held no bias in this case. *See* Whitacre Inv. Co. v. State, Dep't Transp., 113 Nev. 1101, 946 P.2d 191 (1997).

Petitioners conclude by claiming that this court created "an issue that was non-existent" by referencing whether the casino use was probable. Petitioners cite the county's brief in support of this argument. Indeed, it is true that the county argued in its brief that the land's use was not in dispute. However, petitioners' counsel conspicuously neglects to acknowledge that she herself raised this "non-existent" issue in her brief and orally argued that

> the hot issue at trial [was] whether or not this—And this is a major point of contention—the property could have been developed into a small casino. The State consistently said 3.5 acres was too small.

In light of these remarks, it baffles this writer how petitioners' counsel, with candor and a straight face, could venture to argue that Chief Justice Rose "mysteriously created an issue that was non-existent."

In sum, I note that it is improper to use a petition for rehearing as a vehicle to personally attack the court or any of its members. In bringing forth this petition, I believe petitioners violated NRAP 40 at the taxpayers' expense. I would deny rehearing on this basis alone, and thus, I concur in this court's decision to deny rehearing.

YOUNG _____, J.
Young

SUPREME COURT OF NEVADA

Nos. 29401, 29477, 29549
October 1, 1997

WHITACRE INVESTMENT COMPANY,
a General Partnership,

Appellant,

—v.—

The STATE of Nevada, on Relation of
Its DEPARTMENT OF TRANSPORTATION,

Respondent.

COUNTY OF CLARK, a Political Subdivision of the State of Nevada, on relation of LAS VEGAS CONVENTION AND VISITORS AUTHORITY,

Appellant,

—v.—

Briant BUCKWALTER; John R. Reese; California Federal Savings and Loan Association, a California Corporation; Tower Enterprises, a partnership; Profit Sharing Plan of Roy R. Valentine, D.D.S., a professional corporation; K.W. Hounsell; K.W. Hounsell, Inc., a Profit Sharing Trust; Profit Sharing Plan of Edgar F. Muncsh, D.D.S., a professional corporation; Ralph W. Engh and Christine J. Engh, husband and wife,

Respondents.

C.B.M., LTD., A Nevada limited partnership,

Appellant,

—v.—

The STATE of Nevada, on relation of its DEPARTMENT OF TRANSPORTATION,

Respondent.

In appeals of condemnation cases, party filed motions to disqualify Supreme Court Justice. The Supreme Court, Young, J., held that: (1) arguments and charges in serial documents expanding on claim that Justice should be disqualified because of alleged animus toward movants' attorney were procedurally improper and would not be entertained, and (2) Justice's conversations with state legislators concerning statutory definition of term "value" to be used in condemnation cases did not constitute advisory opinion or prejudgment of any issue so as to require his disqualification.

Motions to disqualify denied.

Springer, J., filed a dissenting opinion.

Maupin, J., filed a dissenting opinion.

LAW OFFICES OF KERMITT L. WATERS, Las Vegas; Laura Wightman FitzSimmons, Las Vegas, *for Whitacre Investment Company, Buckwalter, Reese, California Federal Savings and Loan Association, Tower Enterprises, Profit Sharing Plan of Valentine, Hounsell, K.W. Hounsell, Inc., Profit Sharing Plan of Munsch, Engh, and C.B.M., Ltd.*

FRANKIE SUE DEL PAPA, Attorney General, and John E. Lambert and Leslie A. Nielsen, Deputy Attorneys General, Carson City, *for State of Nevada, Department of Transportation.*

STEWART L. BELL, District Attorney, and Dale E. Haley, Deputy District Attorney, Clark County; Dickerson, Dickerson, Consul & Pocker and Luke Puschnig, Las Vegas, *for County of Clark, Las Vegas Convention and Visitors Authority.*

OPINION

YOUNG, Justice:

The issue of whether Justice Robert Rose is disqualified because of animus toward Laura FitzSimmons, a party's attorney, was presented and decided in the recent case of Las Vegas Downtown Redev. Agency v. Hecht, 113 Nev. 644, 940 P.2d 134 (1997). Laura FitzSimmons is one of the attorneys for appellant Whitacre Investment Company, respondents Buckwalter, et al., and appellant C.B.M., Ltd. (collectively "movants"), and they again assert that Justice Rose is disqualified because of animus toward their attorney. We elect to follow our holding in Hecht, and reject the motion to disqualify based on animus toward movants' attorney.

On July 17, 1997, movants filed identical motions in each of these appeals seeking leave to file supplements in support of their motions to disqualify Justice Rose. On August 22, 1997, the clerk of this court received, but did not file, identical supplementary documents entitled: "Real Party Laura FitzSimmons' Reply to Justice Rose's Supplemental Response to the Motion to Disqualify Him." The additional arguments and charges presented in these documents expand upon the

claim that Justice Rose is disqualified because of animus toward movants' attorney.

NRAP 35(d) provides that a challenged justice may tender a response in writing to a motion for disqualification. The rule, however, does not permit the filing of a reply to the response tendered by a challenged justice. To the contrary, NRAP 35(d) specifically directs that "[s]erial motions or charges, whether entitled as separate challenges, or as supplements, or entitled in any other way, must not be filed, and will not be entertained." (Emphasis added.) The rationale behind NRAP 35(d) was stated in Ainsworth v. Combined Ins. Co., 105 Nev. 237, 242-43 n. 2, 774 P.2d 1003, 1008 n. 2, cert. denied, 493 U.S. 958, 110 S.Ct. 376, 107 L.Ed.2d 361 (1989), where this court observed:

> [S]ound judicial policy underlies the absence of any provisions in our rules permitting the filing of replies to oppositions to motions and petitions without express leave of the court. See NRAP 27; NRAP 40. No litigant has an unqualified right to inundate a court with motions, supplements, errata, responses, exhibits and replies belatedly asserting arguments that it previously failed to raise. Nor do litigants have unfettered license to utilize such methods to manipulate judicial proceedings and unreasonably delay a final resolution of litigation.

We hold that the arguments and charges in the serial documents of July 17, 1997, and August 22, 1997, are procedurally improper and "will not be entertained." NRAP 35(d). Moreover, we conclude that these documents constitute belated and procedurally improper attempts: (1) to challenge this court's decision in Las Vegas Downtown Redev. Agency v. Hecht, 113 Nev. 644, 940 P.2d 134 (1997); (2) to assert arguments that movants previously failed to raise; (3) to abuse the appellate processes of this court; (4) to obfuscate the issues; and (5) to delay the final resolution of these matters. This court simply cannot afford to further dissipate its limited resources on these disqualification matters. Accord-

ingly, we deny the motions of July 17, 1997, and we decline to entertain the arguments in that document and the document received by the clerk of this court on August 22, 1997. The clerk of this court shall return the documents unfiled.

The second ground cited by the movants is that Justice Rose should be disqualified because in 1993 he allegedly gave an advisory opinion to legislators when they were considering an amendment to NRS 37.009, the section that defines the term "value" to be used in eminent domain cases. We consider that issue in this opinion.

FACTS

Movants assert that Justice Rose is disqualified from participating in these condemnation cases because of conversations he had with two legislators during the 1993 legislative session concerning the definition of the term "value" as contained in NRS 37.009. This definition is used to determine the compensation to be paid to the person or entities whose property is taken through eminent domain proceedings. One state senator indicated that he had talked to then Chief Justice Rose about redefining the term "fair market value."

> Senator Adler stated he had conferred with Chief Justice Rose regarding this question, and that Justice Rose stated the Supreme Court does not have a problem with adding to or changing the definition. The court likes to keep their opinions intact, but the justices stated the legislature should feel free to implement something believed to be better. Senator Adler further advised the court was not adverse to changing or adding to the definition of market value, as long as it was a better definition in the opinion of the legislature.
>
> Senator Smith advised that Chief Justice Rose had similarly assured him.

Justice Rose has explained these telephone conversations in his response filed in opposition to the motions to disqualify him.

> In the winter-spring of 1993, several state legislators called to tell me that the Legislature would be holding hearings to see if a better definition to the term "fair market value" could be achieved. They hoped the Court would not be offended since we had approved the definition in an opinion. I told the legislators that they had the power to redefine the term, and I did not think anyone would be offended. I recall no conversation of what the new definition would be. I did state that the Court may well be called upon to review the legal sufficiency of any new definition. It appeared that the lawyer-legislators who called were merely extending a courtesy to the Court and its then Chief Justice. I gave no advice to the legislators and did not defer to them, other than to acknowledge that they had the power to redefine " fair market value."

DISCUSSION

Movants allege that Justice Rose prejudged an issue before the court and gave an advisory opinion concerning NRS 37.009, the definition of the term "value" to be used in condemnation cases. Even if we assume that NRS 37.009 plays a role in these cases, we find nothing in the records to support this allegation of disqualification made by movants. Justice Rose simply acknowledged that the legislature had the power to redefine the definition of "value," and he did not think the court would be offended. Justice Rose gave no indication about what he thought the definition of "value" should be and also stated that the court may well be called upon to review the legal sufficiency of any new definition. While advisory opinions by this court are prohibited by the Nevada Constitution, this was neither an advisory opinion nor the prejudg-

ing of any issue in these cases. See Nev. Const. art. 6, § 4; City of No. Las Vegas v. Cluff, 85 Nev. 200, 452 P.2d 461 (1969). We see nothing more in these two conversations than what Justice Rose has stated, that the lawyer-legislators were merely extending a courtesy to the court and its then Chief Justice and that he responded in an appropriate, non-committal manner.

CONCLUSION

The issue of Justice Rose's disqualification because of animus toward attorney Laura FitzSimmons was decided against the movants' position in our recent Hecht decision, and this prior ruling disposes of the first ground urged for Justice Rose's disqualification in these cases. We also conclude that Justice Rose did not give an advisory opinion or prejudge an issue in these cases when he discussed the general subject of redefining the statutory definition of value. Accordingly, the movants' motions to disqualify Justice Rose are denied.[1]

SHEARING, C.J., and Papez, D.J., concur.[2]

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[1] In reaching this result, we have not considered the assertion of Justice Rose that Justice Charles Springer should not participate in deciding this motion to disqualify.

[2] The Honorable Dan L. Papez, Judge of the Seventh Judicial District Court, was designated by the Governor to sit in place of the Honorable Robert E. Rose, Justice. Nev. Const. art. 6, § 4.

SPRINGER, Justice, dissenting[1]:

Condemnees have presented to the court documents which, if given due credit, would not under any circumstances allow for Justice Rose's continued participation in deciding these consolidated cases. Refusing to deal with the merits of the documents themselves, the court has simply "returned" the documents "unfiled" to condemnees' counsel.

There is no valid excuse for the court's actions, but the excuse offered by the court for returning the documents is that the documents are "serial" and thus contrary to NRAP 35(d). "Serial" simply means appearing in successive parts; so that if the condemnees had offered a new, "successive" motion, such a new motion might be described as being serial. This is not the case however. The documents returned as being "serial" merely respond to charges that became a part of these present proceedings by virtue of Justice Rose's actions, namely, Justice Rose's filing of his "Supplemental Response" to condemnees' motion to disqualify him. Condemnees cannot be expected to sit by and let Justice Rose's "supplemental" response stand unchallenged. If Justice Rose's "supplemental" response is not successive or serial, then certainly condemnees' reply to Justice Rose is not successive or serial. Plainly and simply, it is not fair for the court to consider Justice Rose's supplemental document and to return the

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[1] Movants' counsel claim that this motion has become moot by reason of the Governor's designations of Judge Dan L. Papez, issued on June 5, 1997. The Governor's designations (on file in all three of the captioned cases) recite that "Justice Robert E. Rose has voluntarily disqualified himself to sit as a Justice of the Supreme Court of Nevada" in these cases and that Judge Papez was designated to sit in Justice Rose's place. On the face of this document, it would appear that the motion to disqualify is moot; however, given that the court's request to the Governor was for a designation only "to assist the court in deciding the disqualification motions," it is clear that Justice Rose disqualified himself only from matters relating to the disqualification motions and, notwithstanding the language in the Governor's designation, has not disqualified himself in these cases.

condemnees' reply to that document to the condemnees, "unfiled."

Justice Rose is clearly disqualified to sit in these condemnation actions by reason of his admitted and openly-expressed bias against Laura FitzSimmons, who is not only one of the lawyers for the condemnees but is herself a financially interested party.

Justice Rose has filed a Response and a Supplemental Response in which he maintains that his bias is against Ms. FitzSimmons alone and not against any of the named condemnees. Ms. FitzSimmons has lodged with the court a Reply to the Rose documents in which she establishes her position as an interested party in this lawsuit, thus having the right as a party, to have Justice Rose removed from these cases. Ms. FitzSimmons' position is firmly documented and supported by authorities; and there is absolutely no question that Ms. FitzSimmons' financial interest in the outcome of these cases entitles her to have Justice Rose removed from the cases. The only way in which Chief Justice Shearing, Justice Young and Judge Papez could possibly rule in favor of Justice Rose under these circumstances would be for them to accept Justice Rose's opposition documents and at the same time refuse to file Ms. FitzSimmons' Reply. Incredibly, the three mentioned jurists have done just this and have taken the position that although Justice Rose has the right to " tender a response in writing to [the] motion for disqualification," they will not "permit the filing of a reply to the response tendered by a challenged justice." In other words, they will listen to what Justice Rose has to say, but they will not listen to what Ms. FitzSimmons has to say. Even though they realize that the FitzSimmons document dictates the granting of condemnees' motion to disqualify Justice Rose, they "decline to entertain the arguments in that document."

Chief Justice Shearing, Justice Young and Judge Papez, after carefully considering the documents presented by Justice Rose, rule that Ms. FitzSimmons' opposing arguments "obfuscate the issues" and "delay the final resolution of these mat-

ters"—insufficient reason, I think, for refusing to consider materials which they know would require them to grant the motion to disqualify rather than to deny it. Rather than give formal recognition to facts that they are already aware of informally, the three jurists of the majority have ordered the clerk to "return the [FitzSimmons'] documents unfiled."

Chief Justice Shearing, Justice Young and Judge Papez are all on notice of the thrust of Ms. FitzSimmons' position (namely, that she is a party and that the law requires that Justice Rose be disqualified by reason of his expressed bias against her) and know that if the documents were not returned unfiled they would be compelled to grant the motions to disqualify Justice Rose. The only way that these three could avoid the clear necessity for disqualifying Justice Rose was to do what they did and to "return the documents unfiled."

I will argue in this dissent that even though the mentioned majority of the court has decided not to consider the dispositive arguments offered by Ms. FitzSimmons, the moving documents that the court is willing to consider still demand the disqualification of Justice Rose because Justice Rose's expressed bias toward Ms. FitzSimmons, as an attorney, is "extreme" and because Justice Rose has made impermissible public comments on the fundamental issue that is before the court in these condemnation proceedings. The arguments which I present in this dissent do not, however, have nearly the persuasive value as do the lengths to which Justice Young (who himself was subject to removal proceedings in these cases, only to be ruled qualified by his colleague, Justice Rose) and Justice Rose have gone to in order to keep Justice Rose in these cases. This speaks for itself. That the majority justices would go so far as to refuse to consider the condemnees' absolute refutation of the arguments made by Justice Rose in his Supplemental Response should convince any reader that there is something amiss in this whole proceeding. The cloud of Justice Rose's continuing to act as a judge in these cases should not be allowed to contaminate these cases and to create questions about the integrity of this court.

The majority's excuse for sending the condemnees' papers back to them is that they are required to do so by NRAP 35(d). This, to my mind, is pretense; but even if their reliance on NRAP 35(d) could be seen as being supportable, basic fairness would require that the condemnees in these cases be heard and that the court not rely entirely upon the unanswered documents of Justice Rose. Issues of fundamental fairness aside, it is clear that NRAP 35(d) does not justify their actions. As pointed out in the majority opinion, NRAP 35(d) prohibits the filing of "serial motions or charges." Ms. FitzSimmons presents no serial "motions or charges" in these cases. All Ms. FitzSimmons was trying to do was to respond to Justice Rose's arguments. Justice Rose presented to the court two laborious Responses, arguing that his bias against Ms. FitzSimmons, as an attorney, was not so "extreme" as to require his disqualification. The documents now returned to Ms. FitzSimmons merely point out that Justice Rose's bias does not have to be "extreme" if in addition to being an attorney she is a principal and financially interested in the outcome. There is nothing "serial" about Ms. FitzSimmons' natural response to Justice Rose's arguments; and I can see no conceivable reason for the court's present decision to silence Ms. FitzSimmons and to return her papers unfiled.

Having stated as my primary disagreement with the order denying condemnees' motion to disqualify Justice Rose the arbitrary decision by Chief Justice Shearing, Justice Young and Judge Papez to silence the condemnees' attempts to oppose the arguments that Justice Rose makes on his own behalf, I will proceed now to discuss the issues that were considered by the majority, namely, the effect of Justice Rose's making public comments on the ultimate issue to be decided in these cases and Justice Rose's "extreme" bias against Ms. FitzSimmons.

JUSTICE ROSE'S PUBLIC COMMENT ON PENDING CASES

As appears in the majority opinion, Justice Rose discussed the ultimate issue in these appeals, namely, that of "redefining the term 'fair market val ue.' " He discussed this subject in some manner with "several" legislators. The majority tells us of at least two, Senator Adler and Senator Smith. Canon 3B(9) of the Nevada Code of Judicial Conduct prohibits judges from making public comments on pending or impending proceedings. As stated in the majority opinion, certain legislators "conferred with Chief Justice Rose regarding this question." I do not believe that such conferences are permitted by Canon 3B(9).

There are two versions of Justice Rose's conference with legislators. As appears from the majority opinion, the condemnees claim that "Justice Rose prejudged an issue before the court and gave an advisory opinion concerning . . . the definition of the term 'value' to be used in condemnation cases." Justice Rose, on the other hand, tells us that the mentioned conference was comprised of a series of telephone calls from various legislators who were merely "extending a courtesy" to Justice Rose as chief justice and discussing forthcoming plans of the legislature "to see if a better definition to the term 'fair market value' could be achieved." Justice Rose does not "recall" a specific "conversation of what the new definition would be."

The conflict in positions between the challenged justice and the condemnees is precisely the type of conflict that Canon 3B(9) was designed to prevent. The Canon tells judges not to "make any public" comment that might be expected to impair the fairness of the pending case. (My emphasis.) If Justice Rose had declined to make any comment on matters that he knew were pending before this court, he would not have faced this controversy. The majority resolves the controversy simply by accepting the position of their colleague, Justice Rose, and by rejecting the position of the condemnees. This is not

a fair way to treat litigants—deciding controversies of this kind in favor of one of their fellow court-members without any further exploration of the condemnees' position. Further, it does not matter to me whether Justice Rose's conference with legislators took place in the manner that he describes it or whether it took the form claimed by the condemnees—in either event, Justice Rose is guilty of making public comments on pending litigation. To my way of thinking, such a conference impairs the fairness, or at least the appearance of fairness, in these cases. Justice Rose should disqualify himself. Based on the application of Canon 3B(9), I dissent to the order denying the motion to disqualify Justice Rose.

JUSTICE ROSE'S BIAS TOWARD ATTORNEY FITZSIMMONS

Condemnees' motion to disqualify Justice Rose is also based on Justice Rose's biased attitude toward one of their attorneys, Laura FitzSimmons The majority states that it will "elect to follow our holding in Las Vegas Downtown Redev. Agency v. Hecht, 113 Nev. 632, 940 P.2d 127 (1997)". In Hecht, a motion similar to the one in these cases was filed, in which the bias of Justice Rose against attorney FitzSimmons was raised. It is not claimed by the majority that the Hecht case is res judicata or that the condemnees in these cases, different parties entirely from those in the Hecht case, are precluded from raising the issue here. It is my belief that the circumstances surrounding Justice Rose's statements and treatment of Ms. FitzSimmons undeniably call for Justice Rose's removal from these cases.

My dissent is based in large part upon the documents filed by Justice Rose in Whitacre on February 4, 1997, and in Buckwalter and C.B.M. on February 7, 1997, entitled "Response of Justice Rose to Motion to Disqualify Him and Request that Justice Springer Not Participate in Deciding the Motion to Disqualify." In the mentioned Response, Justice Rose accuses condemnees' counsel, Laura FitzSimmons, of

being part of an ongoing conspiracy against Justice Rose, which he calls a "Gunderson/Whitehead/Springer/Steffen coalition." The Rose Response is comprised of a long bill of personal complaints by Justice Rose against Ms. FitzSimmons and against the mentioned conspiratorial coalition, including charges that Ms. FitzSimmons was part of a plan to make public sealed criminal charges that had been issued by a Las Vegas Metropolitan Police officer against Justice Rose, and that, had it not been for Ms. FitzSimmons and her co-conspirators, these charges would have been kept from the public eye and remained "sealed" by order of the district court in Las Vegas.

Ms. FitzSimmons denies that she is part of any such conspiracy; but it is obvious from Justice Rose's document that he earnestly believes that Ms. FitzSimmons is conspiring to destroy him. In my judgment, these beliefs and the other charges which Justice Rose makes against Ms. FitzSimmons create a strong appearance of bias on the part of Justice Rose and lead to the almost inescapable inference that it is impossible for Justice Rose to sit in impartial judgment in these cases while Ms. FitzSimmons is acting as counsel.

Justice Rose resists his disqualification by claiming that although, under Canon 3E of the Code of Judicial Conduct, "a judge can be disqualified for animus toward an attorney," Justice Rose does not consider his "animus" to be sufficiently virulent and "extreme" to warrant his disqualification. Any reader of Justice Rose's Response will come to the unhesitating conclusion that Justice Rose's bias against Ms. FitzSimmons is indeed extreme and that there is virtually no possibility that a judge who feels the way that Justice Rose feels about Ms. FitzSimmons could possibly sit in fair judgment in these cases.

In the mentioned Response, Justice Rose makes two arguments. The first is that deference should be given to his own "opinion as to bias" and that although his past "remarks" about Ms. FitzSimmons may have been derogatory and hateful, he has an excuse, namely, "Justice Rose's remarks were

made in response to statements or actions of Laura FitzSimmons" and were, for this reason, "not evidence of any disqualifying bias."

With regard to Justice Rose's argument that retaliatory remarks made "in response" to attorney FitzSimmons' "attacks" on him do not count, I must say that I have never heard such an argument before. Justice Rose tells us that because the things he has said about Ms. FitzSimmons[2] were in retaliation for and "in response" to the bad things that he claims Ms. FitzSimmons had done and said about him, his "remarks" cannot be admitted as "evidence of any disqualifying bias." Although this is a very interesting position for Justice Rose to take, I fail to see any merit to his claim that he was merely acting in retaliation for past grievances. Frankly, I cannot understand his claim that his acting "in response" to perceived indignities does not constitute "evidence of any disqualifying bias." As I see it, Justice Rose's claim that his retaliatory "remarks" do not count because he was provoked into making them is just more evidence that he is truly and "extremely"[3] biased against Ms. FitzSimmons.

Attorney FitzSimmons' response to the charges made by Justice Rose in his Response is put this way: "Since Justice Rose continues to express his opinion that I am part of a 'coalition'[4] that is intent upon harming him politically, a

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[2] In the motions to disqualify Justice Rose, Ms. FitzSimmons sets out an array of derogatory statements that Justice Rose has made in public against her over the past several years. I find no need in this opinion to catalogue these statements and merely note that Justice Rose does not deny making these remarks. His position is one of confession and avoidance—"Justice Rose's remarks were in response to the statements or actions of Laura FitzSimmons" and, therefore, "are not evidence of disqualifying bias."

[3] See Richard E. Flamm, Judicial Disqualification 124 (1966).

[4] According to Justice Rose's Response there is a "coalition" comprised of movants' attorney, Laura FitzSimmons, former Chief Justice E.M. Gunderson, former Chief Justice Thomas Steffen, former Judge Jerry Whitehead and, the undersigned, Justice Charles Springer. According to Justice Rose, "based on what [he] considered reliable information,"

reasonable person would certainly question whether Justice Rose would hold the balance nice, clear and true."

It is worthwhile to examine some of the public charges that Justice Rose has levied against Ms. FitzSimmons. I might understand Justice Rose's position better if Ms. FitzSimmons had, as Justice Rose claims, actually slandered Justice Rose or had intentionally provoked him or taunted him. It would then be much easier to understand Justice Rose's extravagant attack and the statements that he has made about her. For example, in his Response, Justice Rose itemizes a number of "legal and political actions taken by FitzSimmons against Justice Rose," including an "independent civil action by FitzSimmons" against Justice Rose. Still, among the many "actions" by Ms. FitzSimmons complained of by Justice Rose I find no untoward or unfair conduct of any kind on the part of Ms. FitzSimmons; nevertheless, it is understandable, to a limited degree, why Justice Rose (if he believed all of the "reliable sources" referred to in his Response) got so angry at attorney FitzSimmons and why, as he puts it, he "has not appreciated these attacks or her conduct."[5]

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the members of the named conspiracy have been conspiring against him in the form of "legal and political action."

[5] While admitting that he has not "appreciated" all of the things that he claims have been done to him by Ms. FitzSimmons and despite the tone of ire and displeasure that runs throughout his Response, Justice Rose writes in his Response that he "had always considered [him]self to be a good friend of Laura FitzSimmons." Ms. FitzSimmons' sworn response to this is as follows:

> I do know that I have never considered Justice Rose to be a friend. Indeed the only conversation of a personal nature that I recall having with Justice Rose was a fund raiser that I hosted for him in Carson City during his first campaign. The guests left, and Justice Rose and I were sitting outside. He was complaining about how strenuous the campaign had been. I told him that I thought it would be hard to campaign for a judgeship, and later resist the temptation, as a judge, to reward friends and punish enemies. Justice Rose looked me in the eye and replied that he was not one to resist temptation, and he was looking forward to pay backs. I was uncomfortable with that statement at the

I believe the key to judging Justice Rose's bias or lack of it in these cases is his assertion that his "responsive statements" were "precipitated" (provoked) by "attacks against him" that became known to him based upon undisclosed "reliable information made available to him." The information available which Justice Rose claims to have gotten from unnamed sources might have disclosed to Justice Rose some conduct which he deemed to be inappropriate on the part of Ms. FitzSimmons; but there is certainly nothing in the record that would support such a conclusion.

It is apparent from Justice Rose's Response that the perceived "attacks" by Ms. FitzSimmons that "precipitated" Justice Rose's "responsive statements" against Ms. FitzSimmons are centered on what Justice Rose describes as Ms. FitzSimmons' filing of a "civil complaint to require the Eighth Judicial District Court in Clark County to make public certain wiretapped conversations of Justice Rose surrounding the criminal investigation of Michael and Rhonda Mushkin" and Justice Rose. Justice Rose attaches to his Response a copy of Ms. FitzSimmons' "civil complaint," which is a "Petition to Unseal Wiretap Information." This document discloses that a district judge had, in a secret proceeding entitled "DR# 92-0919-1101," ordered that certain police files relating to Justice Rose, Michael Mushkin and Rhonda Mushkin be sealed and withdrawn from public view. I will not speculate about what political forces might have been exerted to bring about the unheard-of action of a district judge's ordering that certain police files be "sealed," nor will I speculate on why the district court did not grant Ms. FitzSimmons' motion to "unseal" these public records; but I will say that there does not appear to be anything untoward or provocative about Ms. FitzSimmons' motion to unseal, which, she advises the court, was made for the purpose of "preparing various documents for filing" and was based on the Nevada Public Records Act (NRS 239.010).

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time it was made, and later events have only increased my concern.

What is untoward and what should provoke any citizen is the fact that Ms. FitzSimmons' request for inspection of public documents was not granted, especially when the Las Vegas Metropolitan Police and the district attorney of Clark County consented to the "unsealing" of these public documents.

In her Reply, Ms. FitzSimmons explains that the purpose for her filing the mentioned Petition was to obtain documents in support of a complaint to the Nevada Commission on Judicial Discipline, pursuant to what she believed to be her ethical obligation, and not, as Justice Rose has asserted, to "make public those conversations." Attorney FitzSimmons tells us that the discipline complaint was held by the Commission, the executive director of which Justice Rose has described as one of his "closest friends," until this court decided Hogan v. Warden, 112 Nev. 553, 916 P.2d 805 (1996). Thereafter, the complaint was dismissed by the Commission, which justified the dismissal entirely upon that opinion, in which Justice Rose sat in judgment of issues relating to his own alleged misconduct.

Part of the information contained in the sealed documents referred to above became public despite the court order sealing it; and the source of Justice Rose's displeasure with Ms. FitzSimmons appears to be that he blames her for trying to make public documents public, documents described by Justice Rose in his Response as being wiretapped conversations in which "I [Rose] was a party concerning the criminal investigation into the activities of Michael and Rhonda Mushkin. Michael Mushkin was indicted after a lengthy investigation, and I had one or more conversations with Rhonda that were intercepted by wiretapped surveillance. These wiretaps were transcribed for the state's prosecution of Michael Mushkin but were subsequently sealed by the Court."

It is understandable that Justice Rose would have been concerned about these wiretaps' becoming public knowledge and especially concerned when, for the first time, it appeared in the newspapers that Justice Rose was the subject of a sworn criminal complaint charging him with obstruction of public

justice and seeking his arrest. Even though the district attorney refused to prosecute the criminal complaint and Attorney General Del Papa also "declined to prosecute" the criminal complaint, if Justice Rose believed that this embarrassing public disclosure was brought about by the "intentional actions" of Ms. FitzSimmons and her "coalition," then it does explain why he feels the way that he does about her and explains why he was moved to make "responsive statements" about Ms. FitzSimmons. What it does not explain, however, is how, given the kind of "animus" against Ms. FitzSimmons that is demonstrated by Justice Rose in his Response, he can be expected to act fairly and impartially in these cases.

Justice Rose's public comments on the dispositive issue in these cases and his "extreme" animus toward counsel demand that he be disqualified from sitting in these cases.

CONCLUSION

The decision to deny the motion to disqualify Justice Rose is additionally clouded by the fact that the deciding vote is cast by Justice Young, who, himself, was challenged for bias in these cases. The way that the challenges against Justice Young and Justice Rose have been resolved in these cases is simply that Justice Rose casts the deciding vote that Justice Young is not biased; and now Justice Young casts the deciding vote ruling that Justice Rose is not biased. This procedure is tainted and unfair on its face, remindful of the time when Justice Young and Justice Rose decided a case in which they had been previously disqualified. Whitehead v. Comm'n on Jud. Discipline, 920 P.2d 491 (1996).[6]

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[6] In arguing at such length that Justice Rose's bias against Ms. FitzSimmons, as an attorney, is "extreme" and therefore sufficient to disqualify him, I do not want to leave the impression that I believe that "extreme" bias is necessary in these cases. Ms. FitzSimmons is an interested party in these cases and, as such, it is not necessary to establish "extreme" bias against her. As I have argued above, if this court were to

MAUPIN, Justice, dissenting:

I agree that the conversation between members of the legislature and Justice Rose do not provide sufficient grounds for

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have given due consideration to the supplemental motion and supporting documents, as it properly should, the court would have been hard pressed, in good conscience, to deny the motion to disqualify Justice Rose and thereby permit Justice Rose to continue to sit in these cases.

By failing to consider the condemnees' supplemental motion, the majority is ignoring a dispositive point raised by the condemnees, namely, that Ms. FitzSimmons is not only attorney for condemnees, she is, herself, indisputably, a real party in interest.

In Hecht and in these cases, the court rules in favor of Justice Rose (who calls himself a "real party in interest") on the ground that Justice Rose's frequently-expressed bias and ill-will toward Ms. FitzSimmons was not so excessive as to be extreme bias. The rule of "extreme bias," has, of course, no application to Ms. FitzSimmons as a real party in interest, and one who is subject to losing large sums of money if Justice Rose's admitted bias against her is allowed to come into play. (Justice Rose states in his "Supplemental Response" that "[a]s a practical matter, the real parties in interest are Justice Rose and attorney Laura FitzSimmons. . . .") This being the case, the majority in these cases acted mistakenly in holding that disqualification was not mandated except where the bias could be shown to have been "extreme."

It is not fair for this court to have decided the present motion without considering the matters which were called to the court's attention in the supplemental motion that it has refused to consider and returned to the movants. In addition to calling attention to the fact of Ms. FitzSimmons' being, like Justice Rose, a real party in interest, the supplemental motion raised a number of other critical matters that should have been considered by the court. For example, contained in the moving papers is an opinion, in affidavit form, expressed by Richard Edward Flamm, the leading authority on judicial disqualifications, an opinion which "mandate[s]" Justice Rose's disqualification. Mr. Flamm is the author of Judicial Disqualification: Recusal and Disqualification of Judges, a nationwide treatise published by Little, Brown and Company in 1996. The treatise examines in detail the principles which have been espoused by the nation's courts in deciding judicial disqualification motions and appeals. This court relied (incorrectly) on two sections of Mr. Flamm's treatise in its opinion denying the motion to disqualify Justice Rose in Hecht.

After a careful review of Hecht and of all the pertinent documents in the present case, "as well as a host of cases on point," Mr. Flamm expressed, under oath, the following professional opinions:

(*footnote continued*)

his disqualification. However, in most other respects, I cannot subscribe to either the majority or the dissent in these matters. Based upon my own review of the record, and without conceding that PETA v. Berosini, 110 Nev. 78, 867 P.2d 1121 (1994), is a correct application of the doctrine surrounding disqualification of judicial officers, I would grant the instant disqualification motion.

I have formed the opinion that Justice Rose's expressed animus towards Ms. FitzSimmons does indeed mandate his disqualification from this case. . . . I do not believe that this general proposition (that a judges's bias against an attorney must be "extreme") justifies Justice Rose continuing to sit in cases in which Ms. FitzSimmons represents a party on a contingent fee basis. . . . In her moving papers Ms. FitzSimmons attested (and Justice Rose did not deny) that she has a pecuniary interest in the outcome of these proceedings. . . . In my opinion, a real party who possesses a substantial interest in the outcome of a proceeding has a due process right not to have that case decided by a court whose membership includes a judge whose impartiality might reasonably be questioned. For this court to decide this matter without having considered the vital matters presented in the supplemental motion is completely without justification.

IN THE SUPREME COURT OF THE STATE OF NEVADA

Filed July 15, 1997

No. 24976

LIA ARNOLD ROBERTS REVOCABLE FAMILY TRUST, AURELLIA ARNOLD ROBERTS, TRUSTEE,

Appellant,

—vs.—

COUNTY OF CLARK, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,

Respondent.

No. 29401

WHITACRE INVESTMENT COMPANY, A GENERAL PARTNERSHIP,

Appellant,

—vs.—

THE STATE OF NEVADA, ON RELATION OF ITS DEPARTMENT OF TRANSPORTATION,

Respondent.

No. 29477

COUNTY OF CLARK, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, ON RELATION OF LAS VEGAS CONVENTION AND VISITORS AUTHORITY,

Appellant,

—vs.—

BRIANT BUCKWALTER; JOHN R. REESE; CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, A CALIFORNIA CORPORATION; TOWER ENTERPRISES, A PARTNERSHIP; PROFIT SHARING PLAN OF ROY R. VALENTINE, D.D.S., A PROFESSIONAL CORPORATION; K.W. HOUNSELL; K.W. HOUNSELL, INC., A PROFIT SHARING TRUST; PROFIT SHARING PLAN OF EDGAR F. MUNCSH, D.D.S., A PROFESSIONAL CORPORATION; RALPH W. ENGH AND CHRISTINE J. ENGH, HUSBAND AND WIFE,

Respondents.

No. 29549

C.B.M., LTD., A NEVADA LIMITED PARTNERSHIP,

Appellant,

—vs.—

THE STATE OF NEVADA, ON RELATION OF ITS DEPARTMENT OF TRANSPORTATION,

Respondent.

ORDER DENYING MOTIONS TO DISQUALIFY JUSTICE YOUNG

Appellant Roberts Revocable Family Trust; appellant Whitacre Investment Company; respondents Buckwalter, et al.; and appellant C.B.M., Ltd. (collectively "movants") assert that Justice Young has shown express or implied bias against Kermitt Waters because: (1) Waters donated heavily to Justice Young's opponent in Justice Young's 1996 re-election campaign and comments Justice Young made about Waters' donations, and (2) the Attorney's office represents the State in these cases and the Attorney General endorsed and publicly supported Justice Young in the previous election. These same arguments were made and rejected in Las Vegas Downtown Redev. Agency v. Hecht, 113 Nev. __, __ P.2d __ (Adv. Op. No. 70, June 3, 1997), and State, Dep't of Transp. v. Barsy, 113 Nev. __, __ P.2d __ (Adv. Op. No. 76, June 17, 1997), and those decisions are dispositive of these grounds for disqualification.

Accordingly, the motions to disqualify Justice Young filed in these cases are hereby denied.

It is so ORDERED.[1]

SHEARING, C.J.
Shearing

ROSE, J.
Rose

MAUPIN, J.
Maupin

[1] The Honorable Cliff Young, Justice, did not participate in the decision of these motions.

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 29447

COUNTY OF CLARK, et al.,

Appellants,

—vs.—

BRIAN BUCKWALTER, et al.,

Respondent.

AFFIDAVIT OF RICHARD EDWARD FLAMM

Richard Edward Flamm, being first duly sworn, swears under penalty of perjury as follows:

1. I am an attorney-at-law duly licensed to practice before the state courts of New Jersey, New York and California. I have also been admitted to practice before the D.N.J., S.D.N.Y., N.D. Cal., and C.D. Cal.; as well as the Fifth, Sixth, Ninth and Federal Circuit Courts of Appeal. I am not a party to this matter and have no interest in its outcome.

2. In my private practice I concentrate exclusively on matters of judicial and legal ethics. I frequently lecture on these topics and have authored a number of articles on judicial disqualification, attorney disqualification, and related topics.

3. I am also the author of *Judicial Disqualification: Recusal and Disqualification of Judges*, a nationwide treatise

which was published by Little, Brown and Company of Boston in 1996. That treatise examines in detail the principles which have been espoused by the nation's courts in deciding judicial disqualification motions and appeals. This Court relied on two sections of my book in denying the motion to disqualify Justice Rose in the *Hecht* case.

4. I have filed briefs or expert certifications in dozens of attorney and judicial disqualification proceedings. I have both sought and opposed motions for disqualification. Because of my legal and academic work in this field, I am very interested and concerned about the development of the law of judicial disqualification.

5. Laura Wightman FitzSimmons has requested that I provide the Court with my opinion as to whether Justice Rose's disqualification is warranted in this case because of his animus toward her. In order to be in a position to form an opinion on this question, I have reviewed a number of documents, including the motion to disqualify Justice Rose filed by Ms. FitzSimmons in the *Hecht* case, the response of Justice Rose to that motion, Ms. FitzSimmons' response to that of Justice Rose, the order of this Court denying Ms. FitzSimmons' motion to disqualify Justice Rose in *Hecht*, and the Supplemental Response of Justice Rose to the motion to disqualify him in this case. I have also reviewed relevant Nevada cases and provisions of the Nevada Code of Judicial Conduct.

6. After reviewing the above-referenced materials, as well as a host of cases on point, I have formed the opinion that Justice Rose's expressed animus towards Ms. FitzSimmons does indeed mandate his disqualification from this case.

7. The *Hecht* opinion cited my treatise for the proposition that "[t]o warrant judicial disqualification—much less other, more drastic sanctions—the judge's bias toward the attorney ordinarily must be extreme . . .". This is an accurate quotation; however, I do not believe this general proposition justifies Justice Rose continuing to sit in cases in which Ms. FitzSimmons represents a party on a contingent fee basis.

8. The primary reason why courts do not routinely disqualify judges on the basis of their expressions of ill-feelings towards attorneys is that such animus does not necessarily translate into bias for or against a party that would result in an unfair trial. Because bias against an attorney does not necessarily imply bias against a party, many courts have held or implied that, for a judge's animus towards an attorney to warrant disqualification, the bias must be "extreme" enough for the Court to believe that it is likely to be transferred to a party that attorney represents.

9. The holdings in most (if not all) of these cases presume, however, that the attorney who is the subject of the judge's alleged animus is not *also* a party—i.e., that he or she has no personal or pecuniary stake in the outcome of the case (other than reputational interest which all attorneys have in prevailing). In such cases, there is usually little reason to believe that a judge, even if biased against the attorney, would reach a decision adverse to the interests of the attorney's client. Consequently the judge's animus, even if conceded, does not provide a compelling ground for disqualification.

10. Where, however, the involved attorney is not only an attorney, by also a party or real party in interest in the case, the usual reasons for declining to order disqualification on the basis of a judge's bias against an attorney do not apply. Indeed, in situations where the attorney for the moving party has a substantial pecuniary interest in the case, there would appear to be no reason—in logic or law—for a court to treat a judge's demonstrated animus towards that attorney any differently than it would his animus towards any other party.

11. In her moving papers Ms. FitzSimmons attested (and Justice Rose did not deny) that she has a pecuniary interest in the outcome of these proceedings, in the form of a substantial contingent fee. Indeed, in his recently filed supplemental response in this case, Justice Rose has deemed Ms. FitzSimmons to be a real party in interest to these proceedings.

12. In my opinion, a real party who possesses a substantial interest in the outcome of a proceeding has a due process

right not to have that case decided by a court whose membership includes a judge whose impartiality might reasonably be questioned.

13. *Hecht* also cites my treatise for the proposition that "[s]ituations in which judges have manifested such extreme bias toward an attorney [as to warrant disqualification] are exceedingly rare."

14. It is true that disqualification motions based on animus toward counsel have been granted only sparingly. However, this may well be explained by the fact that most of the reported disqualification motions of this type were based upon the challenged judge's *intra judicial* comments about an attorney's *in*-court conduct.

15. In most of the reported cases dealing with disqualification motions of this type, the motions were based upon a judge's expression of irritation or frustration with the moving attorney's litigation tactics or in-court conduct; or his questioning of whether the attorney was providing the client with adequate representation. They were not cases like this, in which the motion for disqualification was based upon comments a judge made in an *extrajudicial* forum, in which he speculated about an attorney's *extrajudicial* conduct.

16. The fact that Justice Rose's animus towards Ms. FitzSimmons had both an extrajudicial source and extrajudicial expression distinguishes this motion from the vast majority of cases in which disqualification motions based on a judge's animus towards an attorney were denied on the grounds that the animus alleged was not sufficiently "extreme". In fact, I cannot recall having ever reviewed a case in which a motion based on analogous extrajudicial comments was denied on the grounds that the judge's animus towards the attorney was not "extreme".

17. The *Hecht* order also cited my treatise for the proposition that "a party or his attorney should not be permitted to cause the disqualification of a judge by virtue of his or her own intentional actions." Like the *Hecht* court's other cita-

tions to my book, this proposition is correct as a general principle. However, its invocation in the context of the facts of this case, and indeed in *Hecht,* is not only misplaced, but inexplicable.

18. According to the moving papers, Justice Rose has accused Ms. FitzSimmons of (1) being part of an "orchestrated effort" to leak confidential wiretaps about his alleged criminal misconduct; (2) being one of a group of people who had "promised" potential opponents of Justice Rose's "up to $100,000.00 in campaign contributions" and "all the derogatory information they could get about me;" and (3) being somehow responsible for a motion to disqualify him filed in a case in which Ms. FitzSimmons swears she had no role.

19. It is true that, if Ms. FitzSimmons had done these things, Justice Rose might be able to defend against the disqualification motion by invoking the rule that "a party or his attorney should not be permitted to cause the disqualification of a judge by virtue of his or her own intentional actions."

20. As I read the relevant papers, however, while Justice Rose *alleged* that Ms. FitzSimmons induced him to make the comments which manifest his animus towards her, there has been no evidentiary showing to that effect. Ms. FitzSimmons has denied each of the allegations of Justice Rose under oath, as well as the assertion that she did anything to entrap Justice Rose into uttering disqualifying statements.

21. A claim that an attorney has manufactured the grounds for the judge's disqualification is in the nature of an affirmative defense to an otherwise valid disqualification motion. In order to prevail upon such a "defense", it must either be obvious that the attorney created the basis for the disqualification motion, or competent proof that such is the case must be adduced.

22. Here there is no proof that Ms FitzSimmons took the actions Justice Rose has accused her of. Moreover, the *Hecht* court ignored Ms. FitzSimmons' request for an evidentiary hearing on this matter.

23. In my opinion, in light of Ms. FitzSimmons' sworn statement and the absence of any competent evidence to the contrary, there is simply no basis upon which the *Hecht* court could have properly concluded that she "created" the grounds for Justice Rose's disqualification. Therefore, while a party should not be permitted to cause the disqualification of a judge by virtue of her own intentional actions, there has been no showing that this is what has happened here.

24. I note, parenthetically, that many jurisdictions do not permit judges who have been challenged by a disqualification motion to controvert the facts alleged in support of the motion. The fact that the *Hecht* majority appears to have given more weight to Justice Rose's allegations, based upon information he claimed to have obtained from undisclosed informants, than to the sworn statements of Ms. FitzSimmons, based upon her personal knowledge may go a long way to explaining why this is so.

25. The *Hecht* majority correctly noted that "[i]n a state with a relatively small number of attorneys disqualifying judges because an attorney before them had participated in the process of or had opposed a judge or justice would subject many judges and justices to disqualification." However, the majority appears to have leaped from this accurate premise to the conclusion that Justice Rose's comments did not warrant disqualification in that case because he "was in a difficult campaign for re-election" at the time he made those comments and Ms. FitzSimmons "was actively opposing him."

26. The majority is right that the fact that an attorney has actively opposed a judge's election, **standing alone**, has traditionally been deemed to provide an insufficient factual predicate for judicial disqualification. However, the reason this is so is that it is generally presumed that the mere fact that an attorney has opposed a judge's election will not cause the judge to harbor such ill-feelings against the attorney as to affect his ability to be impartial in cases in which that attorney subsequently appears.

27. Where the allegation of judicial bias is not based upon mere speculation that the judge *might* harbor animus towards the attorney who supported his adversary, but upon comments made by the judge which manifest that he *does indeed mistrust and resent the attorney*, such a presumption must give way.

28. In *Hecht*, as well as here, the motion to disqualify Justice Rose was not based upon the mere fact that Ms. FitzSimmons opposed his election, nor upon her unsupported speculation that Justice Rose *might* have become biased against her as a result. The motion was based, rather, on a series of comments Justice Rose made which show quite conclusively that Justice Rose believes Ms. FitzSimmons was part of a conspiracy to destroy his career.

29. In denying the disqualification motion in *Hecht*, the majority expressly relied on Justice Rose's stated belief that he can be fair towards Ms. FitzSimmons' clients, regardless of his feelings towards her. By deferring to Justice Rose's subjective opinion of his ability to be unbiased, the *Hecht* court applied an incorrect standard for determining whether his impartiality "might reasonably be questioned."

30. Like other similar provisions, Canon 3(E) of the Nevada Code of Judicial Conduct does not specify the standpoint from which the question of whether a "judge's impartiality might reasonably be questioned" is to be determined (i.e., from that of the litigant, the judge or a reasonable observer).

31. However, the great weight of case law interpreting the Code and an analogous federal statute, 28 U.S.C. § 455(a), makes it clear that the question of whether the judge's "impartiality might reasonably be questioned" is not to be determined from the subjective perspective of the challenged judge himself. In fact, because a judge may be convinced of his own impartiality, yet still act in a manner which would cause a reasonable person to question his impartiality, it is generally agreed that the judge's subjective view as to his ability to be impartial is irrelevant.

32. The *Hecht* order stated that Justice Rose's subjective perception of his ability to be fair was "reinforced" by the fact that Ms. FitzSimmons' clients won most of the cases in which Justice Rose "sat as a justice since her allegations of bias." However, most of the cases in which Justice Rose voted in favor of Ms. FitzSimmons clients were criminal cases, and, I am informed, none of the cases in which Justice Rose voted in favor of Ms. FitzSimmons' clients were cases in which she was to receive a contingency fee. Thus, in none of those cases did Ms. FitzSimmons have a substantial pecuniary interest. Because that is so, Justice Rose's voting record on prior cases involving Ms. FitzSimmons' other clients would not provide a reasonable person with an accurate barometer of whether he will be able to be impartial in this case or in other cases in which she has an interest.

33. The *Hecht* order also denied the motion on "implied waiver" grounds. Once again the Court erred. As I noted in my treatise, the "primary purpose of the implied waiver rule . . . is to nullify the rewards of 'sand-bagging' through employment of dilatory tactics, and to prevent parties from disqualifying judges after first determining their views as to the merits." These types of concerns are not present in situations where, as here, the disqualification motion was made in a timely fashion, and before the challenged judge's views on the merits could be gleaned.[1]

34. The fact is, moreover, that shortly after Justice Rose made one of his offending comments, Ms. FitzSimmons wrote him a letter in which she requested (Justice Rose says "demanded") that he step down from *all cases* involving her clients. That letter shows that Ms FitzSimmons was not

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[1] I understand that an additional basis for the disqualification of Justice Rose—that he has expressed to the legislature his views on the merits of one of the issues present in this appeal—is present here. Since that basis was not present in *Hecht*, and since this affidavit is being supplied in support of a document filed in response to Justice Rose's recent supplement arguing that *Hecht* controls the disposition of the disqualification motion in this case, the scope of this affidavit is being limited to the disqualification issues common to this case and *Hecht*.

attempting to "sandbag" the Court through the "employment of dilatory tactics," nor to wait and see how Justice Rose would rule *on this case* before seeking relief.

35. There are a number of practical reasons why an attorney might file a disqualification motion in one case but not do so in another.

36. For one thing, the right to seek judicial disqualification typically belongs to the client, not the attorney; and while one client may be willing to risk incurring the wrath of the challenged judge by seeking this type of relief, another may not. Because this is so, for this Court to hold that an attorney's decision not to seek disqualification for one client in one case automatically waives a different client's right to seek disqualification in another case would deprive the second of a right that many courts have held to be "fundamental."

37. Likewise, an attorney may conclude that a judge's disqualification is necessary to protect the client's interests in one case, but not in another. For example, because Ms. FitzSimmons neither could nor would have any pecuniary interest in the outcome of a divorce case, she would have no reason to believe that Justice Rose's animus towards her would manifest in an adverse decision against one of her divorce clients.

38. The *Hecht* order conceded that, in finding that Ms. FitzSimmons impliedly waived her client's right to seek disqualification in that case, it relied on two cases which were distinguishable on the grounds that they concerned untimely motions to disqualify judges in particular cases, rather than counsel's putative failure to seek to disqualify the judge in prior cases in which she represented other clients. Nevertheless, the majority opined that "the reasoning of those cases appears equally applicable to FitzSimmons' attempt to disqualify Justice Rose in only some of the cases where she has appeared as counsel for a party."

39. I beg to differ. In the process of compiling *Judicial Disqualification* I reviewed over 3,000 state and federal

disqualification cases. I do not recall ever having come across a single case in which any other Court ever held that a client's right to seek a judge's disqualification in one case could be impliedly waived by its attorney's decision not to seek such relief for a different party in a prior case.

40. In researching my second treatise (on conflicts of interest and attorney disqualification) I did come across one case in which an attorney sought to resist disqualification on the grounds that the moving party had not moved to disqualify him in a prior case involving that party in which the attorney had appeared. *Ullrich v. Hearst Corp.*, 809 F. Supp. 229 (S.D.N.Y. 1992). In *Ullrich*, however, the Court summarily disposed of the attorney's implied waiver argument.

41. In my opinion, the reasons for rejecting an "implied waiver" defense in this case are much more compelling than they were in *Ullrich*. For one thing, while an attorney is rarely disqualified by a court *sua sponte*, the Code of Judicial Conduct is self-enforcing on the part of the judge.

42. The Code exists, moreover, not merely to vindicate the interests of a party or an attorney, but to preserve the *public*'s confidence in the integrity of the judicial system. Because this is so, I am of the opinion that an attorney can neither confer upon a judge the right to violate a Canon of the Code of Judicial Conduct, nor agree to waive such a violation.

43. The *Hecht* majority's final reason for not disqualifying Justice Rose on the basis of his animus towards Ms. FitzSimmons was that, if it permitted her to seek Justice Rose's disqualification every time she represented a party before this Court or "associated to represent a party," she "would have a potent weapon that would permit [her] to disqualify one justice of the court in any case."

44. This argument has some superficial appeal. However, in my opinion, it does not hold up under analysis. For one thing, the possibility that Justice Rose might have to disqualify himself from participating in multiple cases involving Ms. Fitzsimmons' clients is hardly novel. Judges routinely recuse

themselves from cases involving close relatives, former partners and others with whom they are intimately acquainted.

45. Since judges routinely disqualify themselves from cases involving those with whom they are perceived to have a close relationship, there would appear to be no sound reason for holding that judges are immune to disqualification when the opposite is perceived.

46. It is true that, when a judge indicates that he will recuse himself from all cases in which a particular attorney appears as counsel of record, the theoretical possibility exists that the attorney could be retained as a stratagem in order to force the ouster of an unwanted judge. However, it would appear that few courts have declined to disqualify themselves on this basis.

47. One reason why this is so is that, in situations where a court is truly concerned about the possibility that an attorney or firm has been retained as a ploy for the purpose of effecting the disqualification of a judge, the court may solve the problem by disqualifying the attorney—it need not disqualify the judge.

RICHARD EDWARD FLAMM

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SUBSCRIBED and SWORN to
before me this 19th day of August, 1997.

STACEY SILVERBERG
NOTARY PUBLIC